

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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FOR MR. CHIEF JUSTICE MARTIN.

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Court of Appeals of the District of Columbia

APRIL TERM, 1929

No. 5020

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SPECIAL CALENDAR

WINFIELD S. CAHILL AND ALVA W. VOYCE,
ADMINISTRATORS C. T. A. OF ESTATE OF
AMELIA E. EBERLY, DECEASED, APPELLANTS,

vs.

RAYMOND G. EBERLY, EXECUTOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

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Court of Appeals of the District of Columbia

No. 5020.

WINFIELD S. CAHILL et al., Admrs., &c., Appellants,

vs.

RAYMOND G. EBERLY, Executor.

1 Filed Aug. 29, 1927. James Tanner, Register of Wills, D. C., Clerk of Probate Court.

I, Samuel G. Eberly, of the City of Washington, in the District of Columbia, being of sound and disposing mind, do make, publish and declare this and none other to be my last will and testament, hereby revoking any and all other wills heretofore made by me and ratifying and confirming this and none other to be my last will and testament.

Item 1: I hereby will and direct that all of my just debts, including my funeral expenses and the expenses incident to my last illness, be paid as soon after my death as may be possible.

Item 2: All of my real estate, including that which I now own as well as that which I may own or to which I may be in any manner entitled at the time of my death, I give and devise to my executor hereinafter named, his successor or successors, in trust to sell and convey the same or any part thereof, in fee simple, at such time, for such price and upon such terms as in his judgment or in the judgment of his successor or successors may be to the best interests of my estate, without liability on the part of any purchaser or purchasers thereof to see to the application of the purchase money received therefor, and the proceeds of said sale or sales to divide into six (6) equal parts, retaining one of said parts for his own use and benefit, paying over one each of said parts to my daughters Maude E. Boyden

and Ethel G. Carpenter and my son William C. Eberly and retaining two (2) of said parts for the use of my wife Amelia E. Eberly subject to the limitations and upon the trusts hereinafter provided for with respect to her share of my personal property, the child or children of any of my children which may die during my lifetime, to take the share to which its or their deceased parent would have been entitled.

SAMUEL G. EBERLY.

2 Item 3: All of my personal property of every kind and description, I bequeath unto my said executor in trust to sell, set over and transfer the same at such price or prices as in his judgment or the judgment of his successor or successors may be deemed expedient or necessary and after dividing the proceeds thereof into six (6) equal parts to retain one of said parts for his own use and benefit and to forthwith pay over one of said parts to my daughter Maude E. Boyden, one to my daughter Ethel G. Carpenter and one to my son William C. Eberly, retaining the remaining two-sixths part in trust for my wife Amelia E. Eberly upon the trusts hereinafter set forth; the child or children of any of my children which may die during my lifetime, to take the share to which its or their deceased parent would have been entitled.

Item 4: I will and direct that the two-sixths share or portion of my real and personal estate herein demised and allotted to my said wife Amelia E. Eberly shall be hers for her life only and shall be held by my said executor, his successor or successors, in trust for her sole and exclusive use and benefit during the period of her natural life, with power and authority to my said executor to invest and reinvest the same, and the income and revenues derived therefrom to pay over to my said wife in equal semi-annual instalments so long as she shall live, and upon her death to forthwith divide the same among himself and my three other children hereinbefore named in equal proportions, share and share alike, the child or children of a deceased child to take the share to which its or their deceased parent would have been entitled. It is my will, since my said wife is possessed in her own right of a competency and an income

SAMUEL G. EBERLY.

3 sufficient for her needs, which said competency and income have been acquired by her chiefly through my aid and effort expended in her behalf both before and since our marriage, that the portion of my estate demised in trust for her use and benefit in this my last will and testament be accepted by her in lieu of her right of dower and any and all claims against my estate.

I hereby designate and appoint my son Raymond G. Eberly to be Executor of this my last will and testament and request that he may be permitted to serve as such without giving bond for the faithful performance of his duties. In the event of his death, inability or refusal to act, I designate and appoint the Union Trust Company of the District of Columbia, to serve in his place and stead and direct that said Company be required to give such bond as in the opinion of the Court shall be deemed reasonable and just.

In testimony whereof, I have hereunto set my hand and seal this ninth day of April, A. D. Nineteen Hundred and Eighteen.

SAMUEL G. EBERLY. [SEAL.]

Signed, sealed, published and declared by the above named testator, Samuel G. Eberly, as his last will and testament, in the presence of us, who at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses, this ninth day of April, 1918.

M. H. LEECH,

Woodward Bldg.

RICHARD A. FORD,

Woodward Bldg.

LOUIS G. ALLING,

Woodward Bldg.

SAMUEL G. EBERLY.

(Endorsement: Last Will and Testament of Samuel G. Eberly. Filed Aug. 29, 1927. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

4 WINFIELD S. CAHILL ET AL., ADMRS., ETC., VS.

4 In the Supreme Court of the District of Columbia,
Holding a Probate Court.

Adm. No. —.

In re Estate of SAMUEL G. EBERLY, Deceased.

Waiver.

Without waiving any right which I may have to renounce any or all of the provisions of the Will of Samuel G. Eberly made in my behalf and expressly reserving the right to take from the Estate of Samuel G. Eberly, the share which the law allows me to take, exclusive of the provisions of the Will, I hereby waive all citation in the above entitled cause and consent that letters testamentary issue unto Raymond G. Eberly as provided in said Will, and in case I shall renounce the provisions in said Will made for me, I consent that the said Raymond G. Eberly shall still act in all respects as executor and as administrator of the estate of Samuel G. Eberly, deceased.

AMELIA E. EBERLY.

(Endorsement: Waiver and Consent of Amelia A. Eberly. Filed Sep. 12, 1927. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

5 Filed Oct. 26, 1927. Theodore Cogswell, Register of
Wills, D. C., Clerk of Probate Court.

Attest:

J. S. McC.

J. H. L.

I, Amelia E. Eberly, (widow of Samuel G. Eberly) residing in the City of Washington, in the District of Columbia, being of sound and disposing mind, memory and understanding, considering the certainty of death, and the uncertainty of the time thereof, do make this my last Will and Testament, in the manner following, that is to say:

After the payment of all my just debts and funeral expenses, I give, devise and bequeath my estate as follows:

Item I. I give and bequeath to Mrs. Amanda M. Voyce, my sister-in-law, my large diamond earrings.

Item II. I give and bequeath to Hattie Winebrenner, (my niece by marriage to my first husband), of the City of Baltimore, the sum of Fifteen Hundred Dollars (\$1500.00), and also my violet pin with diamond therein.

Item III. I give and bequeath to my nephew, Alva W. Voyce, of the City of Baltimore, the diamond cluster scarf pin, formerly worn by my deceased husband, Samuel G. Eberly, as a remembrance of me, but direct that this bequest is not to be construed as given him as and for compensation for his services as executor of this, my will.

Item IV. I give and bequeath the smaller pair A. E. E. of diamond earrings, belonging to me, to my grand niece, Alvera M. Voyce, the daughter of my nephew, Alva W. Voyce.

Item V. Inasmuch as I am entitled to a widow's share in the estate of my deceased husband, Samuel G. Eberly, I give and bequeath to each of the following of my stepchildren, (children of my said husband), the sums specified after each of their names, as follows:

To Raymond G. Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3000.00);

6 Attest:
 J. S. McC.
 J. H. L.

To William Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars, (\$3000.00);

To Maud E. Feeley, nee Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars, (\$3000.00);

To Ethel G. Carpenter, of Washington, D. C., the sum of One Thousand Dollars, (\$1000.00);

each, and every, of said sums, so bequeathed, to be paid out of such money, securities, or other property as shall accrue to me out and in connection with the settlement of my deceased husband's estate, now in course of administration, and from no other source whatever, and in event the share thereof allotted to me shall be insufficient to pay such sums in full, then each bequest herein made shall abate proportionately in amount.

Item VI: I give and bequeath to my brother, William H. Voyce, of the City of Baltimore, the sum of Ten Thousand Dollars, (\$10,000.00).

Item VII: I give and bequeath to my nephew, Thomas
Voyce, (a son of my deceased brother George),
A. E. E. of the City of Baltimore, the sum of One Thou-
sand Dollars, (\$1000.00).

Item VIII: All the rest and residue of my estate, not here-
inbefore specifically devised or bequeathed, of whatsoever
kind or nature, whether real, personal or mixed, and
whether held in possession, remainder, or in any other
manner, including any balance of the share of my deceased
husband's estate, which may be allotted to me in the dis-
tribution thereof, over and above the portion thereof be-
queathed to my stepchildren named in the Fifth Item hereof,

7 I give, devise and bequeath, in equal shares, to my
sister, Sarah Jane Cahill and to my brother, Charles
W. Voyce, both of the City of Baltimore, share and
share alike:

Item IX: In the event any person named in this, my Will,
to take any part or portion of my estate, either by way of
specific or general legacy to him, or to share in the residue
thereof, shall institute any proceeding, either by way of
caveat or in any other manner, designed to break or avoid
the terms of this, my Will, or shall participate in any man-
ner in such a proceeding, though not formally named as a
party thereto, then and in such case, I do hereby revoke any
legacy, devise or bequest herein made to any such person,
and the share or portion so heretofore given to such person
shall fall into and become a part of the residue of my estate
and shall pass under the residuary clause hereof.

Item X: I do hereby make, constitute and appoint my
nephew, Alva W. Voyce, of the City of Baltimore, in the
State of Maryland, to be the executor of this, my Last Will
and Testament, hereby revoking all other wills heretofore
made by me.

In testimony whereof I have hereunto subscribed my
name and affixed my seal this eleventh day of October, in
the year nineteen hundred and twenty-seven.

AMELIA E. EBERLY. [SEAL.]

Signed, sealed, published and declared by the above
named Testatrix, Amelia E. Eberly, as and for her last
Will and Testament, in the presence of us, who at
8 her request, in her presence, and in the presence of

each other, have hereunto subscribed our names as witnesses thereto.

J. SHERIDAN McCLEES,
2929 N. Charles St.
JOHN H. LEDEM,
105 S. Broadway.

9

Form No. 78

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To-wit:*

I, Theodore Cogswell, Register of Wills for the District of Columbia, Clerk of the Probate Court, Do Hereby Certify, That the foregoing is a true copy of the original will of Amelia E. Eberly, deceased, filed and recorded in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, aforesaid; and that the said will after having been duly proven was, by order of the said Court, in accordance with the laws of the District of Columbia, admitted to probate and record on the 31st day of October, A. D. one thousand nine hundred and twenty-seven.

I Further Certify, That said will was duly executed and proved agreeably to the laws and usages of the District of Columbia, and that I have compared the foregoing copy of said will with the original record in said office, and find it to be a full, true and correct transcript thereof.

Witness, my hand and the seal of said Probate Court, this 8th day of December, A. D. 1927.

[Seal Supreme Court of the District of Columbia.]

THEODORE COGSWELL,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

(Endorsement: Exhibit "A". Filed Dec. 14, 1927. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

10 STATE OF MARYLAND,
 City of Baltimore, ss:

Alva W. Voyce and Winfield S. Cahill being first duly sworn do on oath depose and say as follows:

Whereas, the said Samuel G. Eberly, deceased died testate in the City of Washington, District of Columbia on to-wit August 24, 1927, leaving certain children and a widow Amelia E. Eberly surviving him.

And whereas by his last will and testament admitted to probate in the above entitled cause the said Samuel G. Eberly among other things provided as follow:

“It is my will, since my said wife is possessed in her own right of a competency and an income sufficient for her needs, which said competency and income have been acquired by her chiefly through my aid and effort expended in her behalf both before and since our marriage, that the portion of my estate demised in trust for her use and benefit in this my last will and testament be accepted by her in lieu of her right of dower and any and all claims against my estate”.

And whereas the said Samuel G. Eberly was lawfully married to Amelia E. Eberly who survived him and who died testate on to-wit the 20th day of October, 1927.

And whereas the said Amelia E. Eberly never during her life time accepted in lieu of her right of dower or any claim she might have against his estate, that portion of the estate of Samuel G. Eberly, deceased, demised to her by the will of said Samuel G. Eberly, as aforesaid.

11 And whereas the said Amelia E. Eberly, deceased, during her life time and subsequent to the death of said Samuel G. Eberly and the reading and publication of his last will and testament, probated herein; positively and definitely informed Raymond G. Eberly, the executor named in said will, as well as other persons, of her refusal to accept the provisions of the will of her deceased husband and declared her election to take in lieu of any devise or bequest contained in said will, her widow's share of the estate of her said deceased husband, and thereafter the said Amelia E. Eberly, by the terms of her last will and testament dated October 11, 1927, did in writing formally and definitely de-

clare her refusal to accept the devise and bequest to her in said will of said Samuel G. Eberly, deceased, and did declare her election to take that share of his estate allotted to her by law, which written declaration of election is contained in the last will and testament of said Amelia E. Eberly as aforesaid in the following words and figures, viz:

“Item V. Inasmuch as I am entitled to a widow’s share in the estate of my deceased husband, Samuel G. Eberly, I give and bequeath to each of the following of my step-children, (children of my said husband), the sums specified after each of their names, as follows:

To Raymond G. Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars, (\$3000.00);

To William Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars, (\$3000.00);

To Maud E. Feeley, nee Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars, (\$3000.00);

To Ethel G. Carpenter, of Washington, D. C., the sum of One Thousand Dollars, (\$1000.00); each, and every, of said sums, so bequeathed, to be paid out of such money, securities, or other property, as shall accrue to me out of and in connection with the settlement of my deceased husband’s estate, now in course of administration, and from no other source whatever, and in the event the share thereof, allotted to me shall be insufficient to pay such sums in full, then each bequest herein made shall abate proportionately in amount”.

12 “Item VIII. All the rest and residue of my estate, not hereinbefore specifically devised or bequeathed, of whatsoever kind or nature, whether real, personal or mixed, and whether held in remainder, possession, or in any other manner, including any balance of the share of my deceased husband’s estate, which may be allotted to me in the distribution thereof, over and above the portion thereof bequeathed to my step-children named in the Fifth Item hereof, I give, devise and bequeath, in equal shares, to my sister, Sarah Jane Cahill and to my brother, Charles W. Voyce both of the City of Baltimore, share and share alike”.

And whereas at the time of making and execution of said last will and testament the said Amelia E. Eberly was dangerously and fatally ill suffering from disease which

thereafter on to-wit the 20th day of October, 1927 resulted in her death without her leaving her bed in the meantime. Upon the execution of said will and testament the said Amelia E. Eberly delivered the same to the executor therein named, Alva W. Voyce, one of the subscribers hereto, and thereafter, the said Amelia E. Eberly never having revoked or changed her said last will and testament the said Alva W. Voyce caused the same to be filed with the Register of Wills of the District of Columbia on to-wit, October 26, 1927; and subsequently by order of this Court passed on to-wit the 31st day of October, 1927, said will and testament was duly admitted to probate and record as and for the last will and testament of said Amelia E. Eberly and the undersigned Alva W. Voyce and Winfield S. Cahill were by the same order appointed administrators c. t. a. of the estate of said Amelia E. Eberly, deceased and did subsequently duly qualify as such administrators of said estate, all of which more fully appears on the records of this Court as the same are contained herein in Administration Cause Number 36656 which said records are specifically referred to and made a part hereof.

13 And that the refusal of the said Amelia E. Eberly to accept the terms of the said will of the said Samuel G. Eberly, and her election to take the share of the said estate of the said Samuel G. Eberly allotted to her, as his widow, by law, having been made by her in her original last will and testament so filed in this Court as hereinbefore mentioned, the said Alva W. Voyce and Winfield S. Cahill, administrators c. t. a. as aforesaid, do herewith file a certified copy of the said last will and testament of the said Amelia E. Eberly, marked Exhibit "A", and prayed to be taken as part hereof.

Wherefore, the undersigned, Alva W. Voyce and Winfield S. Cahill, administrators, c. t. a. of the estate of said Amelia E. Eberly, deceased, on behalf of said estate claim and hereby make demand that in the distribution of the personal estate of said Samuel G. Eberly, deceased, that the widow's legal share thereof as fixed by Code of Law of the District of Columbia namely one third thereof be allotted and set aside to the credit of the estate of said Amelia E. Eberly and that said amount when so determined be de-

livered and paid to us as administrators c. t. a. of the estate of said Amelia E. Eberly, deceased.

ALVA W. VOYCE,
WINFIELD S. CAHILL,
*Administrators c. t. a. Estate of
Amelia E. Eberly, deceased.*

Address: Key Highway and Webster Streets, Baltimore,
Maryland.

RALPH B. FLEHARTY AND
EMORY L. STINCHCOMB,
*Attorneys for Alva W. Voyce and Winfield S. Cahill,
Administrators.*

Subscribed and sworn to before me this 3rd day of December, 1927.

[SEAL.]

M. IRENE ECKENRODE,
Notary Public.

(Endorsement: Petition of Alva W. Voyce and Winfield S. Cahill, Administrators c. t. a. of Amelia E. Eberly, deceased. Filed Dec. 8, 1927. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

14 *Petition of Winfield S. Cahill and Alva W. Voyce,
Administrators C. T. A. of Estate of Amelia E.
Eberly, Deceased*

The petition of Winfield S. Cahill and Alva W. Voyce, Administrators, c. t. a. of the Estate of Amelia E. Eberly, deceased, respectfully shows to the Court as follows:

I. That petitioners are the duly appointed and qualified Administrators, c. t. a. of the Estate of Amelia E. Eberly, late a resident of the District of Columbia, who died testate on, to wit, October 20, 1927, your petitioners having been appointed Administrators as aforesaid by Order of this Honorable Court, passed October 31, 1927, and file this petition as such Administrators on behalf of the estate of said Amelia E. Eberly, deceased, for the purpose of objecting and excepting to the Account of Raymond G. Eberly, Executor, filed in the above-entitled cause on, to wit, April 2, 1929, and for the further purpose of securing a decree in

reference to said Accounts, adjudicating the amount due petitioners as such Administrators from said Raymond G. Eberly, Executor, as more fully hereinafter set forth.

15 II. Petitioners state that the said Samuel G. Eberly, late a resident of the District of Columbia, died testate on, to wit, ~~October~~ ^{August} 24, 1927, leaving several children and his wife, the said Amelia E. Eberly, surviving him.

III. That by due proceedings had in the above-entitled cause the last Will and Testament of the said Samuel G. Eberly, dated April 9, 1918, was duly admitted to probate and record, and the said Raymond G. Eberly duly appointed Executor thereof; that the said Samuel G. Eberly left no real estate, his entire estate consisting of personal property, all of the foregoing being a matter of record in the above-entitled cause.

IV. That in and by his said last Will and Testament the said Samuel G. Eberly provided as follows:

“Item 3: All of my personal property of every kind and description, I bequeath unto my said executor in trust to sell, set over and transfer the same at such price or prices as in his judgment or the judgment of his successor or successors may be deemed expedient or necessary and after dividing the proceeds thereof into six (6) equal parts to retain one of said parts for his own use and benefit and to forthwith pay over one of said parts to my daughter Maude E. Boyden, one to my daughter Ethel G. Carpenter and one to my son William C. Eberly, retaining the remaining two-sixths part in trust for my wife Amelia E. Eberly upon the trusts hereinafter set forth; the child or children of any of my children which may die during my lifetime, to take the share to which its or their deceased parent would have been entitled.

“Item 4: I will and direct that the two-sixths share or portion of my real and personal estate herein demised and allotted to my said wife Amelia E. Eberly shall be hers for her life only and shall be held by my said executor, his successor or successors, in trust for her sole and exclusive use and benefit during the period of her natural life, with power and authority to my said executor to invest and reinvest the same, and the income and revenues derived therefrom to pay over to my said wife in equal semi-annual in-

stalments so long as she shall live, and upon her death to forthwith divide the same among himself and my three other children hereinbefore named in equal proportions, share and share alike, the child or children of a deceased child to take the share to which its or their deceased parent would have been entitled. It is my will, since my said wife is possessed in her own right of a competency and an income sufficient for her needs, which said competency and income have been acquired by her chiefly through my aid and effort expended in her behalf both before and since our marriage, that the portion of my estate demised in trust for her use and benefit in this my last will and testament be accepted by her in lieu of her right of dower and any and all claims against my estate.”

V. That during the short interim between the probate and record of the Will of said Samuel G. Eberly, deceased, and the death of Amelia E. Eberly, the said Amelia E. Eberly failed and refused to accept that portion of the estate of Samuel G. Eberly, deceased, demised to her by the Will of said Samuel G. Eberly in lieu of her right of dower or any claims she might have against said estate; but, on the contrary, subsequent to the death of said Samuel G. Eberly and the reading and publication of his last Will and Testament, positively and definitely informed Raymond G. Eberly, the Executor named in said Will, as well as other persons, of her refusal to accept the provisions of the Will of her deceased husband, and declared that she would not abide by his request therein contained that she accept the same in lieu of her right of dower and any claims she might have against his estate.

VI. That thereafter, during the early part of October, 1927, the said Amelia E. Eberly, while visiting with relatives near Baltimore, Maryland, contracted a serious and fatal illness, and while confined to her bed and suffering from the illness from which she subsequently died, did, on, to wit, the 11th day of October, 1927, execute her last Will and Testament, and did, in said last Will and Testament, declare her election to take that share of the estate of said Samuel G. Eberly allotted to her by law rather than any amount that might be due her by way of demise or bequest contained in said Will, which written declaration or election, as contained in said last Will and

Testament of Amelia E. Eberly, as aforesaid, is in the following words and figures, namely:

“Item V: Inasmuch as I am entitled to a widow’s share in the estate of my deceased husband Samuel G. Eberly, I give and bequeath to each of the following of my step-children (children of my said husband) the sum specified after each of their names, as follows:

“To Raymond G. Eberly of Cleveland, Ohio, the sum of Three thousand dollars (\$3,000.00);

“To William Eberly of Cleveland, Ohio, the sum of Three thousand dollars (\$3,000.00);

“To Maude F. Feeley (née Eberly) of Cleveland, Ohio, the sum of Three thousand dollars (\$3,000.00);

“To Ethel G. Carpenter of Washington, D. C., the sum of One thousand dollars (\$1,000.00);

“Each, and every, of such sums, so bequeathed, to be paid out of such money, securities or other property as shall accrue to me out of and in connection with the settlement of my deceased husband’s estate now in course of administration, and from no other source whatever, and in the event the share thereof allotted to me shall be insufficient to pay such sums in full, then each bequest herein made shall abate proportionately in amount.

* * * * *

“Item VIII: All the rest and residue of my estate not hereinbefore specifically devised or bequeathed, of whatsoever kind or nature, whether real, personal or mixed, and whether held in remainder, possession or in any other manner, including any balance of the share of my deceased husband’s estate, which may be allotted to me in the distribution thereof, over and above the portion thereof bequeathed to my step-children named in the fifth item hereof, I give, devise and bequeath, in equal shares, to my sister Sarah Jane Cahill and to my brother Charles W. Boyce, both of the City of Baltimore, share and share alike.”

18 VII. Upon the execution of said Will and Testament, the said Amelia E. Eberly delivered the same to the Executor therein named, Alva W. Voyce, and thereafter, the said Amelia E. Eberly never having revoked or changed her said last Will and Testament by codicil or otherwise, the said Alva W. Voyce caused the same to be

filed with the Register of Wills of the District of Columbia on, to wit, October 26, 1927, and subsequently, by Order of this Honorable Court, passed on, to wit, the 31st day of October, 1927, the aforesaid last Will and Testament of said Amelia E. Eberly was duly admitted to probate and record as and for her last Will and Testament; and petitioners state that ever since October 26, 1927, the refusal of the said Amelia E. Eberly to take under the Will of her deceased husband Samuel G. Eberly and her election to take her widow's share in said estate has been a matter of record in the office of the Register of Wills of the District of Columbia, all of which more fully appears in the records of this Court as the same are contained herein, in Administration cause No. 36,656, known as "In re: Estate of Amelia E. Eberly, deceased", the records of which cause are specifically referred to and hereby asked to be considered in connection herewith and made a part hereof.

VIII. Petitioners further state that Item 4 of the last Will and Testament of the said Samuel G. Eberly, among other things, contains the following language:

"It is my will, since my said wife is possessed in her own right of a competency and an income sufficient for her needs, which said competency and income have been acquired by her chiefly through my aid and effort expended in her behalf both before and since our marriage, that the portion of my estate demised in trust for her use and benefit in this my last will and testament be accepted by her in lieu of her right of dower and any and all claims against my estate."

19 And with reference to the said language, and particularly in regard to the statement therein that the competency and income of the said Amelia E. Eberly had been acquired chiefly through the aid and effort expended in her behalf by the said Samuel G. Eberly both before and since their marriage, your petitioners allege that at the time of the marriage of the said Samuel G. Eberly and the said Amelia E. Eberly, on, to wit, the 24th day of November, 1909, the said Amelia E. Eberly had been for many years engaged in the conduct of a rooming and lodging house business in the City of Washington, from which she derived a large income and profit, and that the said

Samuel G. Eberly was in no respect responsible for the accrual of the income and profits therefrom, and that the said Amelia E. Eberly saved out of the profits of said business considerable sums each year and that as a result thereof at the time of the marriage of the said Samuel G. Eberly and the said Amelia E. Eberly on the said 24th day of November, 1909, the said Amelia E. Eberly was in possession of an estate aggregating more than Thirty-two thousand dollars (\$32,000.00), then invested in mortgages and ground rents in the City of Baltimore, Maryland, and deeds of trust on property located in the City of Washington, and that at the date of said marriage her income from said investments alone aggregated more than Eighteen hundred dollars (\$1800.00) per annum, and that subsequent to said marriage said Amelia E. Eberly continued to make investments in mortgages, ground rents and deeds of trust, and that her estate continued to increase from year to year in its aggregate value at a rate substantially equivalent to the addition of the amount of the annual income from her investments as aforesaid, and that at the date of the death

20 of said Amelia E. Eberly, by reason of the investments of said income from year to year the aggregate amount of her estate was in excess of Sixty thousand dollars (\$60,000.00), and that no part of the estate of said Amelia E. Eberly was in any manner due to or the result of any contribution thereto of any character by the said Samuel G. Eberly, and that, in fact, the said Amelia E. Eberly, from time to time, beginning with the year 1900 and thereafter until the year 1919, made loans, in varying amounts, from a few hundred dollars to Nine thousand Dollars (\$9,000.00), to the said Samuel G. Eberly and to certain of his children.

IX. That on the 8th day of December, 1927, your petitioners, as administrators c. t. a. of the said Amelia E. Eberly, filed in this cause their claim in behalf of said estate to receive from the estate of Samuel G. Eberly one-third of the net distributive value thereof as the widow's right of their decedent, a copy of which said claim was duly served upon George W. Offutt, Esq., attorney for Raymond G. Eberly, Executor of said Samuel G. Eberly, on said 8th day of December, 1927, all of which will appear fully and at large from the records of this Court in this cause.

X. That the said Raymond G. Eberly, Executor of the estate of Samuel G. Eberly as aforesaid, has filed herein his First and Second Accounts, by which he shows a net distributable estate of to-wit One hundred twenty five thousand nine hundred one Dollars (\$125901.00), and by which said Accounts he seeks to distribute the sum of Two hundred and five dollars and fifty cents (\$205.50) to the estate of Amelia E. Eberly, deceased, as representing one-third of the net income received by the estate of Samuel G. Eberly, and distributes the balance of said estate, one-fourth each, to the children of said Samuel G. Eberly, as provided for in his said last Will and Testament, thereby entirely ignoring the right of your petitioners to one-third of said net estate, being the widow's share of said
21 estate as fixed by law, which said share would amount to approximately Forty-two thousand dollars (\$42,000.00), and the said Raymond G. Eberly, Executor, has served notice on your petitioners that he will call the aforesaid accounts to the attention of this Honorable Court on, to wit, the 9th day of April, 1929, for approval:

Wherefore, the premises considered, your petitioners hereby except and object to said Accounts, and pray:

1. That a decree be passed herein refusing the approval of said Accounts and finding that petitioners as the Administrators, c. t. a. of the Estate of Amelia E. Eberly, deceased, are entitled to one-third of the net distributable estate of said Samuel G. Eberly, and adjudicating the amount thereof and ordering the said Raymond G. Eberly, Executor of the Estate of said Samuel G. Eberly, to pay such amount to said petitioners as Administrators, c. t. a. of the estate of Amelia E. Eberly, as aforesaid;

2. And for such other and further relief as the nature of the case may require and to the Court may seem just and proper.

WINFIELD S. CAHILL,
ALVA W. VOYCE,

Petitioners.

RALPH B. FLEHARTY,
E. L. STINCHCOMB,

Attorneys for Petitioners.

CITY OF BALTIMORE,
State of Maryland, To wit:

Winfield S. Cahill and Alva W. Voyce, being first duly
sworn, depose and say that they have read the fore-
22 going petition and exceptions by them subscribed,
and know the contents thereof: that the matters and
things therein stated of personal knowledge are true, and
those stated on information and belief, they verily believe
to be true.

WINFIELD S. CAHILL.
ALVA W. VOYCE.

Subscribed and sworn to before me this 1st day of March,
A. D. 1929.

(Seal of M. Irene Eckenrode, Baltimore, Md., Notary
Public.)

M. IRENE ECKENRODE,
Notary Public.

(Endorsement: Petition of W. S. Cahill and A. W. Voyce,
Administrators c. t. a., objecting to account of Executor.
Filed Apr. 8, 1929. Theodore Cogswell, Register of Wills,
D. C., Clerk of Probate Court.)

23 Upon consideration of the claim of Winfield S.
Cahill and Alva W. Voyce, Administrators cum tes-
tamento annexo of Amelia E. Eberly, deceased, widow of
the said Samuel G. Eberly, deceased, filed herein, on the
8th day of December, A. D., 1927, the second and final ac-
count of the said Raymond G. Eberly, filed herein on the
first day of February, A. D., 1929 and the petition of the said
Winfield S. Cahill and Alva W. Voyce, objecting to the said
account filed herein, on the 8th day of April, 1929, it is by
the Court this 22nd day of June, A. D., 1929,

Adjudged, ordered and decreed that the said claim of the
said Winfield S. Cahill and Alva W. Voyce, administrators
cum testamento annexo of the estate of the said Amelia E.
Eberly, be and the same is hereby denied, and the objec-
tions filed herein by said administrators cum testamento
annexo to the said second and final account be and the same
are hereby overruled, and the petition filed herein by them
is hereby dismissed, and

It is further ordered that the said second and final account of Raymond G. Eberly, Executor of the estate of said Samuel G. Eberly, deceased, be and the same is hereby approved.

By the Court:

JENNINGS BAILEY,

Justice.

24 From the above Winfield S. Cahill and Alva W. Voyce, administrators c. t. a. of the Estate of Amelia E. Eberly, note an appeal in open Court. The bond for costs on appeal is hereby fixed at \$100.00 or in lieu thereof \$50.00 in cash may be deposited with the Clerk of this Court. The penalty of a bond to act as a supersedeas is fixed at three thousand five hundred dollars.

JENNINGS BAILEY,

Justice.

Filed Jun. 22, 1929.

THEODORE COGSWELL,

Register of Wills, D. C.,

Clerk of Probate Court.

(Endorsement: Order. Filed Jun. 22, 1929. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

25 *Memorandum.*

July 8, 1929.—Appeal Undertaking of Winfield S. Cahill and Alva W. Voyce, Administrators c. t. a., (\$3,500), to act as a Supersedeas, approved and filed.

26 *Assignment of Errors.*

Come now Winfield S. Cahill and Alva W. Voyce, administrators c. t. a. of the Estate of Amelia E. Eberly, deceased, and for error alleged to have been committed by the court in the hearing of the above entitled cause assign as follows:

1. The Court erred in denying the claim of said administrators c. t. a. that they were entitled to one-third, the widow's share, of the net personal estate of Samuel G. Eberly, deceased.

2. The Court erred in ruling as a matter of law that Amelia E. Eberly, deceased, did not during her lifetime suf-

ficiently elect to take her legal share of her husband's estate and did not legally renounce her right to take any devise or bequest made to her by the will of her said deceased husband, Samuel G. Eberly.

3. The Court erred in signing the decree of June 22, 1929, dismissing the petition of said administrators c. t. a. filed on the 8th day of April, 1929, and overruling the exceptions and objections contained therein to the final account of Raymond G. Eberly, executor.

4. The Court erred in signing the decree of June 22, 1929, approving the said final account of Raymond G. Eberly, executor.

RALPH B. FLEHARTY,

EMORY L. STINCHCOMB,

Attorneys for Winfield S. Cahill and Alva W. Voyce, Administrators c. t. a. of the Estate of Amelia E. Eberly, Deceased.

Service of copy acknowledged this 9th day of July, 1929.

GEORGE W. OFFUTT,

Attorney.

(Endorsement: Assignment of Errors. Filed Jul. 11, 1929. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

28 *Designation of Record on Appeal.*

The Register of Wills,

Clerk of the Probate Court:

You will please prepare transcript of record on appeal to the Court of Appeals in the above-entitled cause and therein include the following:

1. Last will and testament of Samuel G. Eberly, deceased, dated April 9, 1918;

2. Waiver of citation and consent to probate signed by Amelia E. Eberly and filed September 12, 1927;

3. Will of Amelia E. Eberly as admitted to record and probate in administration cause No. 36656, filed as exhibit herein (with certificate);

4. Affidavit of claim of Winfield S. Cahill and Alva W. Voyce, administrators c. t. a. of the estate of Amelia E. Eberly, filed December 8, 1927;

29 5. Petition of Winfield S. Cahill and Alva W. Voyce filed April 8, 1929;

6. Decree dated June 22, 1929, signed by Mr. Justice Jennings Bailey, dismissing petition of Winfield S. Cahill and Alva W. Voyce, administrators c. t. a., and approving account of R. G. Eberly, executor;

7. Memorandum of filing and approval of supersedeas appeal bond;

8. Assignment of errors, and

9. This designation.

RALPH B. FLEHARTY,
EMORY L. STINCHCOMB,

Attorneys for Winfield S. Cahill and Alva W. Voyce, Administrators c. t. a. of the Estate of Amelia E. Eberly.

A copy of the foregoing received this 9 day of July, 1929.

GEORGE W. OFFUTT,

Attorney for Raymond G. Eberly, Executor of the Estate of Samuel G. Eberly, Deceased.

Designation satisfactory.

GEORGE W. OFFUTT,

Attorney for Raymond G. Eberly.

(Endorsement: Designation of Record on Appeal. Filed Jul. 11, 1929. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

30

Form No. 82.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Theodore Cogswell, Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify the foregoing pages, numbered from 1 to 29, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 36465, estate of Samuel G. Eberly, deceased, wherein Winfield S. Cahill and Alva W. Voyce,

Administrators c. t. a. of Estate of Amelia E. Eberly, deceased, are appellants and Raymond G. Eberly, Executor, is appellee, the same constituting a full, true and correct transcript of record of proceedings had in said cause according to the Designation of counsel filed therein and made a part hereof.

I further certify that the bond for appeal, in the penalty of Thirty-five Hundred dollars, was duly filed by said appellants, and approved by said Court on the 8th day of July, A. D. 1929.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the said Probate Court, this 25th day of July, A. D. 1929.

[Seal Supreme Court of the District of Columbia.]

THOMAS COGSWELL,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

31 Filed Jul. 11, 1929. Thomas Cogswell, Register of Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia.

Administration No. 36465.

In re the Estate of SAMUEL G. EBERLY, Deceased.

Agreed Statement of Case.

It is agreed by Winfield S. Cahill, Alva W. Voyce, administrators *cum testamenta annexo* of the Estate of Amelia E. Eberly, late of the City of Washington, District of Columbia, appellants, by their attorneys, Ralph B. Fleharty and Emory L. Stinchomb, and Raymond G. Eberly, executor of Samuel G. Eberly, late of the District of Columbia, deceased, appellee, by his attorney, George W. Offutt, that the questions presented by this appeal can be determined without an examination of all the pleadings and evidence, and with the approval of the trial justice who presided at the hearing of the case in the Supreme Court of the District of Columbia, that the following statement of the case, together with the transcript of record as prepared

by the Clerk of the Probate Court and filed herein, shall be accepted as a statement of facts essential to a decision of questions raised by this appeal:

That the said Samuel G. Eberly died on the 24th day of August, 1927, leaving surviving him his widow, the said Amelia E. Eberly, now deceased, and four children by a former marriage, viz., Raymond G. Eberly, Ethel G. Carpenter, Maude E. Feeley, and William C. Eberly.

32 That the said Samuel G. Eberly died testate, leaving a will dated April 9, 1918, a copy of which is included in the transcript of record, and that said will was filed in the office of the Register of Wills of the District of Columbia on the 29th day of August, 1927, and was duly admitted to probate on the 12th day of September, 1927, and that on the same date the said Amelia E. Eberly did consent to the probate of said will by a written waiver of citation in which she reserved the right to renounce her rights under said will, as will appear by copy thereof included in the transcript of record. By the order of probate aforesaid, the said Raymond G. Eberly was appointed executor under said will and thereafter duly qualified and served as such.

That thereafter the said Amelia E. Eberly, having orally declared her intention to renounce under the will of her said deceased husband, left Washington on or about October 1, 1927, for a visit with relatives in Baltimore, Maryland, and that during said visit she became seriously ill, and on October 11, 1927, made and executed her last will and testament, a copy of which is included in the transcript of record, and that thereafter, on October 20, 1927, the said Amelia E. Eberly died at Baltimore, Maryland, without having recovered from the aforesaid illness.

That the said will of Amelia E. Eberly was filed with the Register of Wills of the District of Columbia on the 26th day of October, 1927, and by order passed on October 31, 1927, was duly admitted to probate, and the said Winfield

33 S. Cahill and Alva W. Voyce duly appointed as administrators *cum testamenta annexo* thereof, and thereafter, on December 8, 1927, the said Winfield S. Cahill and Alva W. Voyce, administrators c. t. a., duly filed in the above cause their duly verified claim for the distribution to them as personal representatives of Amelia E.

Eberly of one-third of the net personal estate of Samuel G. Eberly, a copy of which said claim is included in the transcript of record.

That on December 10, 1927, the return of appraisers was filed in the above cause, listing stocks and bonds belonging to the Estate of Samuel G. Eberly aggregating \$103,360, consisting of stocks \$81,560.50 and bonds \$21,799.50, and that thereafter, on February 17, 1928, an inventory of money and debts due the deceased, aggregating \$—, was filed in this cause, and subsequently, on March 21, 1928, an inventory of personal property was filed, listing stocks and bonds as per appraisal.

That on October 12, 1928, the first account of Raymond G. Eberly, executor, was filed in the above cause, and subsequently exceptions thereto were filed by the said Winfield S. Cahill and Alva W. Voyce, administrators c. t. a., which exceptions were thereafter withdrawn under a stipulation, in order that partial distribution might be made to the children of Samuel G. Eberly, certain securities being retained by Raymond G. Eberly, executor, to protect the claim of said administrators. And thereafter the said Raymond G. Eberly, executor, filed his final account, in which account he sought to distribute equally to the four children of said Samuel G. Eberly named in his will as beneficiaries

thereof all the net principal of the said estate, which
34 was therein stated to be \$125,901.79, and by said account attempted to distribute the sum of \$205.50 to the legal representatives of the Estate of Amelia E. Eberly, the sum being stated to be one-third of the net income of said estate from August 24, 1927, to October 20, 1927, date of death of said Amelia E. Eberly; and on April 2, 1929, said executor notified the attorney for appellants that said final account would be submitted to the court for approval on April 9, 1929; and thereafter, on April 8, 1929, the said Winfield S. Cahill and Alva W. Voyce, administrators c. t. a. of Amelia E. Eberly, filed their petition in the above cause, objecting and excepting to said account, and thereby sought an order directing said executor to distribute to them, as the personal representatives of said Amelia E. Eberly, deceased, one-third of the said personal estate of the said Samuel G. Eberly, deceased, a copy of which said petition and exceptions is included in the transcript of record.

And thereafter, no answer to said petition and exceptions of said administrators having been filed by the appellee, the said petition and exceptions were calendared for hearing by the appellee, and thereafter the cause came on for hearing on June 5, 1929, before Mr. Justice Jennings Bailey, of the Supreme Court of the District of Columbia, holding a probate court. That at said hearing George W. Offutt, attorney for the appellee, agreed in open court that the facts alleged in said petition and exceptions of the said administrators c. t. a. of Amelia E. Eberly filed in this cause on April 8, 1929, as aforesaid, were to be deemed admitted to be true and established as facts for the purpose of the hearing.

35 And at said hearing it was further stipulated by and between the respective counsel for the parties thereto that any and all papers that might have been filed in the probate court of the District of Columbia in administration cause No. 36656, same being in the matter of the Estate of Amelia E. Eberly, might upon reference thereto be considered by the court in the hearing of this case and treated as being received in evidence.

Thereupon, the duly probated will of Amelia E. Eberly, deceased, dated the 11th day of October, 1927, was received in evidence and read by the court, and reference was had to the order admitting said will to probate and to the proceedings had in said cause, as hereinbefore recited herem.

Thereupon, upon consideration of all the relevant pleadings and papers filed in the above entitled cause; stipulations and agreements of counsel, as hereinbefore set forth; duly filed and recorded papers in said administration cause No. 36656, and argument of counsel, the presiding justice announced that he had reached the conclusion that, as a matter of law, the said Amelia E. Eberly had not legally renounced her right to take under the will of her deceased husband, Samuel G. Eberly, and that therefore the administrators c. t. a. of her estate were not entitled to receive one-third of the personal estate of said Samuel G.

36 Eberly, deceased, and that he would sign an order dismissing the petition of said administrators c. t. a. filed herein, as aforesaid, on April 8, 1929, overruling the objections and exceptions therein contained. Whereupon the said administrators c. t. a., by their counsel, duly excepted to the conclusion and ruling as announced by the

court, which said exception was duly allowed and noted. And thereafter, on June 22, 1929, the said court signed a decree dismissing said petition, overruling the objections and exceptions therein contained and approving the said final account of said Raymond G. Eberly, executor, a copy of which said decree is included in the transcript of record.

RALPH B. FLEHARTY,
EMORY L. STINCHCOMB,

Attorneys for Winfield S. Cahill and Alva W. Joyce, Administrators c. t. a. of the Estate of Amelia E. Eberly, Deceased.

GEORGE W. OFFUTT,

Attorney for Raymond G. Eberly, Executor of the Estate of Samuel G. Eberly, Deceased.

JENNINGS BAILEY,

Justice Supreme Court of the District of Columbia.

37 [Endorsed:] Administration No. 36465. Re Estate of Samuel G. Eberly, deceased. Agreed statement of case on appeal. Filed Jul. 11, 1929. Thomas Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Endorsed on cover: District of Columbia Supreme Court. No. 5020. Winfield S. Cahill et al., Admrs., &c., appellants, vs. Raymond G. Eberly, executor. Court of Appeals, District of Columbia. Filed Jul. 27, 1929. Henry W. Hodges, clerk.

FOR MR. JUSTICE ROBB.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 12 1929

Henry H. Hodge

Court of Appeals of the District of Columbia

APRIL TERM, 1929.

No. 5020.

SPECIAL CALENDAR

WINFIELD S. CAHILL and ALVA W. VOYCE,
Administrators, C. T. A., *Appellants.*

vs.

RAYMOND G. EBERLY, Executor, *Appellee.*

BRIEF ON BEHALF OF APPELLANTS

RALPH B. FLEHARTY,
EMORY L. STINCHCOMB,
Attorneys for Appellants.

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Court of Appeals of the District of Columbia

APRIL TERM, 1929.

No. 5020.

SPECIAL CALENDAR

WINFIELD S. CAHILL and ALVA W. VOYCE,
Administrators C. T. A. of Estate of AMELIA E.
EBERLY, DECEASED, *Appellants*.

vs.

RAYMOND G. EBERLY, Executor, *Appellee*.
APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLANTS

This appeal is brought for the purpose of obtaining a review of an order of the Supreme Court of the District of Columbia, holding a Probate Court, approving the

final account of Raymond G. Eberly, Executor of the Estate of Samuel G. Eberly, deceased, (the Appellee), and dismissing the claim, petition, and exceptions of the Appellants, Winfield S. Cahill and Alva W. Voyce, Administrators c. t. a. of the estate of Amelia E. Eberly, deceased, the latter having been the widow of Samuel G. Eberly. (R. pp. 18, 19.)

FINANCIAL REASON FOR APPEAL

In his final account, the Appellee allotted to the Appellants the sum of \$205.50, stated to be one-third of the income of the estate of Samuel G. Eberly during the short period intervening between his death on August 24th, 1927, and that of his widow, on October 20, 1927. (R. pp. 17, 24.)

The Appellants, however, claim the allowance of \$205.-50 was improperly made, and that they are entitled to receive the "widow's share," being one-third of the net distributable estate. As the account shows a balance of \$125,901.00, remaining after payment of debts and expenses, the "widow's third" would be \$41,967.

ISSUES RAISED BY APPEAL

Upon the Record in this case, there appear to be two questions for the determination of this Court; the first of import only to the parties to the case, and those represented by them, but the second is of such scope as to be of general importance to those interested in the estates of deceased persons, where a widow survives.

These two questions are:

1. Whether the widow of Samuel G. Eberly, under the facts and circumstances of this case, was required to file any renunciation of the provision made for her by his will and to make an election to take her legal share of his estate under the terms of Section 1173 of the District of Columbia Code.

2. Whether a strict and literal compliance with the terms of Section 1173 must be established, or will a substantial compliance with its provisions, as disclosed by the facts of this case, be sufficient.

With reference to the second proposition, the contention of the Appellee seems to be that the spirit of the law should be disregarded and that it must be administered according to its letter alone, and it is submitted that in the decision of this question this Court must either align itself with those tribunals which adopt a policy of strict construction, or with those jurisdictions which are controlled by its purpose and substance, refusing to be fettered by its letter, thus making its interpretation a matter of justice, and construing it according to the equity and right of the matter.

NO CONFLICT AS TO FACTS

Generally, in the cases which are submitted to courts for their adjudication there is some controversy between the parties as to the existence of the facts pertinent and necessary to decision. In this case, however, there is no such difficulty, as the existence of each fact alleged and relied upon by the Appellants in connection with this Record is found in the undisputed documents contained in the Record, or is formally admitted by the Appellee, either by the "Agreed Statement of Facts," (R. pp. 22-26, inc.), or in the oral statement of Appellee's counsel at the

trial below (R. p. 25), to the effect that the facts alleged in Appellants' Petition and Exceptions. (R. pp. 11-17, inc.), were to be "deemed admitted to be true and established as facts for the purpose of the hearing."

STATEMENT OF FACTS

In the year 1900, Amelia E. Winebrenner, a widow, resided in Washington, D. C., being then about 42 years of age. She had been conducting for some years a boarding and lodging house business. Its conduct by her was successful, and the profits therefrom were considerable. She was of a frugal and saving disposition. The profits of her business were largely invested in mortgages, deeds of trust, and other interest bearing securities of a safe character. (R. pp. 15, 16.)

During or prior to 1900, she became acquainted with Samuel G. Eberly, a widower, having four children by his deceased wife. Apparently he was not then especially prosperous in a financial sense, as in the years following 1900, and inclusive of 1919, he either borrowed himself, or procured loans for his children from Mrs. Winebrenner of amounts varying from a few hundred dollars to \$9,000. As these loans continued until 1919, it is to be presumed that his pecuniary situation had not materially improved up to the year 1919. (R. p. 16.)

A comparison, as of the latter part of 1909, of the financial status of Mrs. Winebrenner with that of Mr. Eberly indicates the superiority of her situation, possessing as she did a prosperous and profitable business, investments of \$32,000, the latter producing accretions to her assets at the rate of \$1800 per annum (R. p. 16), while Mr. Eberly was driven to the necessity of borrowing from her, and had been doing so for nine years past. In this

situation, on November 24th, 1909, Mrs. Winebrenner and Mr. Eberly were married. (R. p. 15).

Subsequent to the marriage, Mrs. Eberly's prudent adherence to a policy of saving continued, and her income from investments was largely allowed to accumulate from year to year, so that her worth as of April, 1918, must have been approximately \$45,000, and her income from investments about \$2700.00 per annum. (R. p. 16.)

In view of the next development, it is important to note, and consider, that the acquirement of her "competency and income" was due solely to her industry, and careful, saving qualities, and that neither its origin nor its increasing amount was in any manner due to any contribution of her husband, either before or after their marriage. (R. p. 16.)

On April 9, 1918, Samuel G. Eberly executed a will, which ultimately was probated on September 12th, 1927, (R. pp. 1-3). Although there is nothing, outside the will itself, to justify the view that his assets had largely increased, the will seems to be of a character to permit the inference that his financial status was greatly improved. It is not a simple, plain, division of a few thousand dollars. Its characteristics are such as to permit the conclusion that his assets had increased considerably since his marriage, unless it is to be regarded as a grandiloquent gesture and an attempted justification of his effort to deprive his widow of her rightful share in his estate.

This latter inference receives support from its provisions, as, after creating a trust, of which his son and executor, the appellee, was made trustee, he provides that each of his four children shall receive absolutely one-sixth thereof, and that his widow shall receive only the income of a trust fund to be derived from the remaining one-third during her life (R. pp. 1-3), she being then

about 60 years of age, and having a life expectancy of but a few years.

For this discrimination, in his will, he sets forth his reason, in the following language: (R. p. 2-3.)

“It is my will, since my said wife is possessed in her own right of a competency and an income sufficient for her needs, WHICH SAID COMPETENCY AND INCOME HAVE BEEN ACQUIRED BY HER CHIEFLY THROUGH MY AID AND EFFORT BOTH BEFORE AND SINCE OUR MARRIAGE, that the portion of my estate demised in trust for her use and benefit be accepted by her in lieu of her right of dower and any and all claims against my estate.”

though this claim as to the source of his wife's property is without foundation in fact, totally at variance with the real situation, and contradicted by the allegations in the Appellants' claim, petition and exceptions, which are admitted by the Appellee to be true by admission in open court, as well as in the Agreed Statement of Facts. (R. p. 25.)

After, as before, Samuel G. Eberly had executed his will, Mrs. Eberly continued her practice of permitting her income to accumulate from year to year, and as a consequence had increased her assets to an amount exceeding \$60,000.00 (R. p. 16) at the date of her husband's death.

He died on Aug. 24th, 1927, (R. p. 12, 27), and his will was read and published between that day and the date of its filing, Aug. 29th, 1927, (R. p. 3, 23). It is clear from her immediately expressed determination to renounce its provisions in her favor and to take a widow's share (R. p. 13) that its provision were theretofore unknown to her, and that the unfounded and groundless claim made in the will aroused her resentment, ignoring as it did the years

of her toil and struggle during which she had labored to bring her business to a profitable basis (R. p. 15-16).

Though the will was filed on Aug. 29th, it was only admitted to probate on Sept. 12th, 1927. (R. pp. 13, 23), and could not even then have been probated except for the signing by the widow of a waiver of citation. (R. pp. 15-16.) There seems to be no reason for the delay in its probate except that the widow's dissatisfaction with its terms, especially as to the claim that her "income and competency" was due to her husband's efforts, was so great and so frequently expressed that the executor delayed action until her consent to its probate could be obtained.

At any rate, by Sept. 12, 1927, her signature to the waiver of citation (R. p. 4) was procured, as follows:

"Without waiving any right which I may have to renounce any or all of the provisions of the Will of Samuel G. Eberly made in my behalf and **EXPRESSLY RESERVING THE RIGHT TO TAKE FROM THE ESTATE OF SAMUEL G. EBERLY, THE SHARE WHICH THE LAW ALLOWS ME TO TAKE**, exclusive of the provisions of the will, I hereby waive all citation in the above entitled cause and consent that letters testamentary issue unto Raymond G. Eberly as provided in said Will, and in case I shall renounce the provisions in said Will made for me, I consent that the said Raymond G. Eberly shall still act in all respects as executor and as administrator of the estate of Samuel G. Eberly, deceased."

and, thus the last obstacle to the probate of the will removed, the position of the executor, by the waiver's terms, assured, the probate and his qualification occurred that same day.

All persons interested in the estate, except the widow, are satisfied with the provisions of the will. She has declared her purpose to renounce the provisions of the will, and has elected to receive in lieu thereof her legal widow's share.

But she is old, feeble, upset by sorrow, indignant at the misrepresentation by the one she has lived with for 18 years, in the closest relation possible to human beings; she has neglected a mere formality. She has not yet evidenced by a writing her declared purpose and intention and filed it in the proper office.

About Oct. 1st, 1927, the widow left Washington to make a visit with her own relatives in Baltimore (R. pp. 13, 23). This old woman in but a few days fell victim to disease, took to her bed, from which she never arose, and in two weeks she died. (R. pp. 13, 23.)

On Oct. 11th, 1927, in Baltimore, confined to her bed, suffering from an illness, doomed to an early death, realizing her course was almost run, the widow makes her last will and testament. (R. pp. 4-7.) Its provisions are significant, especially Item 5 (R. p. 5) as follows:

Item V. INASMUCH AS I AM ENTITLED TO A WIDOW'S SHARE IN THE ESTATE OF MY DECEASED HUSBAND, Samuel G. Eberly, I give and bequeath to each of the following of my step-children, (children of my said husband), the sums specified after each of their names, as follows:

To Raymond G. Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3000.00);

To William Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars. (\$3000.00);

To Maud E. Feeley, nee Eberly, of Cleveland, Ohio, the sum of One Thousand Dollars. (\$1000.00); each, and every, of said sums, so bequeathed, to be paid out of such money, securities, or other property

as shall accrue to me out of and in connection with the settlement of my deceased husband's estate, now in course of administration, and from no other source whatever, and in event the share thereof allotted to me shall be insufficient to pay such sums in full, then each bequest herein made shall abate proportionately in amount.

and Item 8 (R. p. 6) which reads:

Item VIII: All the rest and residue of my estate, not hereinbefore specifically devised or bequeathed, of whatsoever kind or nature, whether real, personal or mixed, and whether held in possession, remainder, or in any other manner, INCLUDING ANY BALANCE OF THE SHARE OF MY DECEASED HUSBAND'S ESTATE, WHICH MAY BE ALLOTTED TO ME IN THE DISTRIBUTION THEREOF, OVER AND ABOVE THE PORTION THEREOF BEQUEATHED TO MY STEPCHILDREN named in the Fifth Item hereof, I give, devise, and bequeath, in equal shares, to my sister, Sarah Jane Cahill and to my brother, Charles W. Voyce, both of the City of Baltimore, share and share alike;

Item 5 reveals the woman's nature; demonstrates her purpose and intent as to her husband's will; clearly indicates her lack of knowledge of the amount of her husband's estate; her determination to take the share she was entitled to receive under the law and to renounce the provisions of the will.

More than that, though without knowledge as to the amount she would be entitled to receive, it evinces a willingness to recognize a moral duty to her stepchildren by providing in the event THE SHARE TO WHICH SHE IS ENTITLED DOES NOT EXCEED \$10,000.00, THE WHOLE SHALL GO TO THEM.

And by Item 8, (R. p. 6), again revealing her lack of information as to the value of her husband's assets, she again affirms her election to take her legal share, and provides that any excess over the \$10,000.00 bequeathed to her stepchildren shall go to her sister and brother as residuary legatees.

Her will furnished the written evidence of her unwavering determination not to abide by the will of her husband and to elect to take the share the law provided. This written evidence of her decision was delivered to Alva W. Voyce, the executor named, on the day of its making, and nine days later she died, never having revoked this will. (R. pp. 10, 14, 23.)

Voyce retained her will in his possession until the 26th day of October, 1927, six days after her death, and then caused it to be filed in the office of the Register of Wills of the District of Columbia. (R. pp. 4, 15, 23.)

The widow declared and made known to the executor her purpose to renounce and elect between the reading of her husband's will and the date of its filing (R. p. 13), she continued firmly in her decision until the date of its probate (R. p. 13); after its probate she again affirmed her decision to the executor (R. p. 23); on Oct. 11th, 1927, 29 days from the probate of her husband's Will, she signs in the presence of witnesses the formal written evidence of her decision (R. "Item 5," p. 5), certifying in writing her decision, and disposing of the share she thereby elected to receive; and on October 26th, 1927, that written evidence was deposited in the place designated by the law (R. pp. 4, 15, 23). Her decision to take against rather than under the will is plainly made; it is evidenced by writing, and that writing is deposited in the office of the official specified by law. All, decision, written evidence, and filing, has been accomplished within 44 days from the date of probate of

the Samuel G. Eberly will, although six months is allowed by law for the completion of the formalities incident to the renunciation of her husband's will and election to take her "widow's right."

Probate of her will followed, and the Appellants' appointment as Administrators c. t. a. occurred on Oct. 31, 1927, (R. pp. 7, 23), and on Dec. 8th, 1927, the Appellants' claim, to share in the distribution of the Samuel G. Eberly estate to the extent of one-third as the "widow's right," was filed, replete with allegations of fact (R. pp. 8-11) and stands to this day unanswered and undenied, but admitted, as to the facts recited.

Mrs. Eberly's fear that her share might not be sufficient to fulfill her bequests to her stepchildren, (See Item 5 and Item 8, her will, R. pp. 5 and 6) was unfounded in fact, but the existence of that fear without foundation, again demonstrates that the Appellee never made the disclosures to her as to the value of the estate in his charge to which she was entitled, as the appraisal of it, amounting to \$103,360.00, was only filed on Dec. 10, 1927, long after her death, and the formal inventory was not filed until March 21, 1928. (R. p. 24.)

And the widow's complete ignorance of the estate's value is further revealed by the final account, filed April 2nd, 1929, disclosing a distributable balance of \$125,901.-79, after payment of all debts of the testator, and the charges and expenses of administration (R. pp. 17, 24.)

On April 8, 1929, the Appellants' Petition and Exceptions to the Final Account was filed, containing explicit allegations of fact herein set out, (R. pp. 11-17), which remained unanswered and undenied even at the time of hearing on June 5th, 1929, (R. p. 25), at which time Appellee, in open court, at the commencement of the hear-

ing, (R. p. 25) admitted that every fact therein alleged was true as stated. (R. p. 25.)

At the conclusion of the hearing on June 6th, the Court, Mr. Justice Jennings Bailey, announced that he would dismiss the claim, petition and exceptions of the Appellants, and approve the account of the Appellee, and that he would sign an order to that effect, (R. p. 25) which was accordingly done on June 22nd, 1929, (R. p. 18), and exceptions thereto taken (R. P. 19), from which order this appeal was then entered to this Court, (R. pp. 19, 20.)

ASSIGNMENTS OF ERROR

The errors assigned and herein relied upon by the appellants are as follows:

1. The Court erred in denying the claim of said administrators, c. t. a. that they were entitled to one-third, the widow's share, of the net personal estate of Samuel G. Eberly, deceased.

2. The Court erred in ruling as a matter of law that Amelia E. Eberly, deceased, did not during her lifetime sufficiently elect to take her legal share of her husband's estate and did not legally renounce her right to take any devise or bequest made to her by the will of her said deceased husband, Samuel G. Eberly.

3. The Court erred in signing the decree of June 22, 1929, dismissing the petition of said administrators c. t. a. filed on the 8th day of April, 1929, and overruling the exceptions and objections contained therein to the final account of Raymond G. Eberly, executor.

4. The Court erred in signing the decree of June 22, 1929, approving the said final account of Raymond G. Eberly, executor.

THE LAW AND ITS APPLICATION

The decision to be rendered in this case depends largely upon the proper application of certain sections of the District of Columbia Code, properly construed and interpreted, viz.:

SECTIONS 1172 to 1176, INCLUSIVE,

prescribing statutory regulations governing WIDOWS' RIGHTS.

The contention of the Appellants is that these sections create no new rights; that they do not alter, abridge or destroy any right existing at the date of their enactment; that the entire purpose and intent of these statutes is limited to the adoption of common law rules of construction, and the creation of record evidence of the exercise by a widow of her common law rights, in order that third persons may have record notice of the manner in which the WIDOW'S RIGHTS have been exercised.

It is submitted that an examination of the law, as it existed prior to the enactment of these sections, showing in detail the WIDOW'S RIGHTS, and the rules adopted by courts with reference to the effect of a will of a husband upon the COMMON LAW RIGHTS OF HIS WIDOW, when compared with the statutory provisions, will demonstrate that substantially every right of a widow, as well as every rule adopted by the courts in reference to the effect thereon of the wills of husbands, have been ratified and confirmed by the statutory provisions, and that the changes by statute relate solely and entirely to procedural and evidentiary matters.

COMMON LAW RIGHTS OF WIDOWS

At common law, a wife, immediately upon assuming that status, became entitled to an inchoate right of dower in the real estate of her husband, of which she could in no manner be deprived by him without her consent. Upon his death this right of dower became absolute.

As to his personal property, although she acquired, by virtue of the marriage, no absolute and perfect right therein, she did take a quasi interest, in that, in spite of the fact that he could defeat her interest by disposing of it in his lifetime, the disposition so made must have been complete, as if he retained dominion over it; the courts construed such a disposition as in fraud of her rights.

Jordan vs. American S. & T. Co., 38 D. C. Appeals 394

Griffith vs. Griffith, 4 H. & McH. (Md) 100, 120

Coomes vs. Clements, 4 H. & J. (Md) 480

Rabbit vs. Gaither, 67 Md. 94, 105.

RULES OF CONSTRUCTION AT COMMON LAW

At Common Law, in the event a man died, interstate, leaving a widow surviving, the legal rights of his widow, both of DOWER and THIRDS, immediately became absolute, and there was in such case no necessity for rules of construction applying to those rights.

The policy of the law was then, and is now, to protect the rights of wives, and to secure to them a reasonable portion of their husbands' estates, and under the Common Law a husband was not permitted to deprive his wife

of her reasonable share of his estate, either directly or indirectly.

Jordan vs. American Sec. & Trust Co., 38 Appeal Cases (D. C.) 394.

When, however, the deceased husband left a will, in which some provision was made for his widow, questions arose as to the effect of such provisions on the WIDOW'S LEGAL RIGHTS of DOWER and THIRDS.

It was universally held that such testamentary provisions did not reduce, change or bar the WIDOW'S RIGHTS to Dower or Thirds. Their only effect was to require her to ELECT as between her widow's rights and the testamentary provision.

As a consequence of the requirement that a widow elect between the two provisions made for her, one legal and the other testamentary, there were adopted by the courts a series of rules of construction, set forth hereafter, and identified as RULES A to H, for convenience of comparison with the terms of the STATUTORY rules of construction contained in Sections 1172 to 1176 of the Code.

RULE A: A simple devise of land to a widow, without language requiring a construction that it was given her in lieu of dower, had no effect upon her dower right. Such a devise was construed as intended to be in addition to her legal right.

RULE B: If a husband's will made a bequest to his widow, not expressly or by legal implication in lieu of her "THIRDS," the testamentary provision was construed to be in addition to her legal share.

RULE C: When a devise or bequest was definitely stated, or by necessary implication held, to be in lieu of dower, it did not, PER SE, deprive the widow of her right

of dower. The only effect of such a provision was to require her to choose or elect between the provision made by will for her as his widow, and the right of dower given her under the law.

RULE D: If the husband's will made a devise or bequest to the widow, and, either by express language or necessary implication, made it apparent that the devise or bequest was intended to be a substitute for her thirds, her right to "thirds" was not destroyed, but only limited by the devise or bequest, in that here again she was required to ELECT between the testamentary provision and her legal right to "THIRDS."

RULE E: A devise or bequest, in lieu of DOWER, standing alone, would only require her to elect as between it and Dower.

RULE F: A bequest or devise, in lieu of "THIRDS," standing alone, would only require the widow to elect as between it and "THIRDS."

RULE G: The combination of devise and bequest by the husband to the widow, though expressly or by necessary implication in lieu of both dower and thirds, would not PER SE defeat either right to Dower or Thirds; it required an election by the widow between the testamentary provision and both Dower and Thirds. She could not take dower and the personal testamentary provision, or the devise and her "thirds." The election had to be in gross.

RULE H: At common law, though the husband, by his will, made a devise or bequest, or both devise and bequest, to his wife, definitely expressed to be, or by necessary implication, in lieu of her dower or thirds, or both, if in fact such devise or bequest was invalid, or if in fact nothing passed to her thereunder, the devise or bequest

was without force to deprive her of her legal rights, and she was not required to make an election.

An analysis of the statutes (Sections 1172 to 1176), will at once disclose that instead of changing the widow's rights as they had existed, they recognized and affirm her rights to DOWER and THIRDS; adopt in every particular, except one, the rules of construction formulated by the Courts, as will at once be apparent by comparison of the statutory provisions contained in Sections 1172 to 1176, with the common law rules hereinbefore set out.

Section 1172 confirms the common law rules as stated in RULES E and F, as, although this section creates a new rule of construction by which either a devise or bequest is to be construed as in lieu of dower or thirds, respectively, it clearly recognizes the common law rule that a devise will only bar dower, and a bequest will only bar thirds, unless otherwise expressed in the will.

Section 1174 adopts the common law rule as stated in RULE G.

Section 1175 confirms the common law rules set forth in RULES E and F, and the proviso in the last paragraph of Section 1175 clearly confirms RULES C, D and G.

Section 1176 adopts RULE H, and demonstrates the statutory purpose to maintain, protect and enforce, and a declination to abrogate or reduce the widow's legal rights. It sends forth the warning that rights may not be defeated by shadows. It specifically provides that the offered substitute for a widow's rights must be of value; that it must be actually received by her; that the substitute must be of a value commensurate with the rights resigned.

All of these sections, 1172-1176, specifically recognize the continued existence of the widow's rights of dower and thirds, in their common law form, and in no manner

attempt to change either the nature or quantum of these rights.

Section 1172 creates a new rule of construction, at variance with RULES A and B, and raises a presumption that devises or bequests respectively are intended by the testator to be in bar of Dower in lands or share of personal estates, respectively, unless otherwise expressed in the will.

It is, therefore, contended that the terms of Sections 1172, 1174, 1175 and 1176, do not in any manner change a widow's rights, as incidents of marriage, and that they adopt every common law rule of construction arising out of a testamentary provision by a husband, except that Section 1172, while confirming the rule that a devise alone only affects dower, and a bequest alone only affects the widow's name in personalty, does abrogate the rule of construction that a devise or bequest, without more, was in addition to the right of dower or thirds respectively.

Before the statutes, a will, such as that contained in this Record, required an election by the widow; under the statutes an election is required by her. Before the statutes, she could have but one of the two alternative provisions, either that created by the law or that provided by the will; since the statutes she can have but one of the two alternative provisions. Consequently, there is no change in her rights, where the will expressly stated its provisions are in lieu of dower and/or thirds.

An examination of Section 1173 discloses that here too no attempt is made to change or modify the "widow's right" inherent in her status as widow. To the contrary, the section affirms and recognizes the "existence of rights" resulting from her status of widowhood.

"A widow shall be barred of HER RIGHT OF DOWER IN THE LAND AND SHARE IN THE PER-

SONAL ESTATE." Certainly this is a legislative recognition of existing rights. It would be an idle thing for Congress to prescribe "a bar" to a right which had no existence in fact—an imaginary thing; a shadow, utterly without substance.

Section 1173 creates no new rights; abolishes none theretofore existing for the benefit of widows. It reaffirms the equitable principle, existing prior to its enactment, that where a widow has the choice between taking under a will or taking her legal rights against the will, she must make a choice, as she can not have both provisions, one under the will and the other under the law.

Prior to the statute, that choice was not required to be evidenced in any specific way, nor was it essential that it be made within any definite period. From this situation great confusion arose. Frequently, long after an executor had settled an estate, often after the death of the widow, the question as to whether the widow had elected to take under or against the will of her husband became a matter for the decision of the courts. Often, rights of third parties had intervened, and would be affected, dependent upon whether it was determined that the widow had or had not made her election the one way or the other, and these questions generally depended upon parol evidence.

The difficulties experienced made legislative action imperative, in order that property rights might be made certain. The result was the enactment by many states of statutes of similar import to those here under discussion.

Section 1173, modeled after the existing Maryland statute (the Act of 1789, ch. 101, sub. ch. 13), brought into being certain procedural and evidentiary requirements, designed to prevent the confusion arising from the fact that theretofore the widow's election was surrounded

by no specific and definite requirements, establishing either the fact that an election had been made or affording constructive notice to all persons dealing with the estate of the character of that election.

It is apparent, therefore, that Section 1173 made no change in the prior law except those that are procedural or evidentiary in character, and these changes are:

1. A limitation of time within which the right of election may be exercised.
2. A requirement that the right must be evidenced by writing.
3. Notice to third parties by providing that the evidentiary writing be filed in the probate court.

INTERPRETATION OF STATUTES

In the construction of the statutes, applicable to this case, the rules of construction are not to be ignored, and their application involves, first, the determination of the question of whether the applicable sections are to be classed as in derogation of the common law.

So far as the statutes may be found to be in derogation of the common law, they are to be strictly construed, and the common law is not to be further abrogated than their language clearly and necessarily implies.

Sutherland on Statutory Construction, 2nd Ed.
Section 573, p. 1060.

“And statutes which take away a common law right —— are strictly construed. The courts can not properly give force to them beyond what is expressed in their words, or is necessarily implied in what is expressed.”

Sutherland, Sec. 573, p. 1058.

A statute, providing that when a testator devised lands to his wife without declaring such devise to be in lieu of dower, it shall nevertheless so operate, and requiring her to make her election between them, is designed as a rule of construction of wills, and to determine the intent of the testator where he had not expressed it, and, being in derogation of the common law rights of the widow, it should be construed liberally as regards her.

Sutherland, p. 1063.

Thompson vs. Egbert, 17 N. J. L. 459, 466.

Statutes which are claimed to abolish any of the incidents of marriage will be strictly construed.

Sutherland, Sec. 574, p. 1061.

The statutes here to be applied, partly confirming and adopting the common law, and partly in opposition to it, so far as they are in opposition, should be, therefore, strictly construed, and consequently Section 1172 and Section 1173 are not to be given any operation or effect not clearly warranted by the language used, nor extended by implication so as to defeat rights existing at common law, and particularly where those rights arise from, and are appurtenant to the marriage relation, and such as arose and were incident to that relation at common law.

NO RENUNCIATION REQUIRED BY MRS. EBERLY

The first contention of the Appellants is that the widow, Mrs. Eberly, under the circumstances of this case, particularly in view of the character of the provision attempted to be made by her husband's will, and especially

on account of the misrepresentation of fact set up therein as his reason for attempting to limit her interest under the will, was not required to file any renunciation under the statutes embodied in Sections 1172 to 1176, inclusive, of the District Code.

This contention is based upon three distinct propositions relating to the application of the statutory law, as interpreted by decisions, and though the three theories are here treated under separate heads, they are closely related, and may be well considered together in achieving a proper result.

These three propositions may be stated as follows:

1. NO RENUNCIATION REQUIRED WHERE IN FACT NO BENEFIT ACCRUED TO THE WIDOW FROM THE PROVISIONS OF THE WILL.

2. NO RENUNCIATION REQUIRED UNLESS THE PROVISIONS OF THE WILL AS TO HER ARE SUBSTANTIALLY EQUIVALENT IN WORTH TO THE VALUE OF HER LEGAL RIGHT.

3. NO RENUNCIATION REQUIRED WHERE THE TESTATOR MAKES A MATERIAL MISREPRESENTATION OF FACT IN HIS WILL, ACCOMPANYING SAME BY AN INADEQUATE PROVISION FOR HIS WIDOW.

In the discussion of the question as to whether Mrs. Eberly was required to renounce, Section 1176, declaratory of a common law rule of construction (RULE H), is of paramount importance.

SECTION 1176: "If, in effect, nothing shall pass by such devise she shall not be thereby barred, whether she shall or shall not renounce as aforesaid, it being the intent hereof that a widow accepting or

abiding by a devise in lieu of her legal right shall be considered a purchaser with a **FAIR CONSIDERATION.**"

The application of this section to the facts of the case is determined by the supposed provision made for the widow, which appears in the Record on pages 1 to 3. and, as the testator left no real estate, it is necessary only to consider Items 3 and 4, as follows:

ITEM 3: All of my personal property of every kind and description, I bequeath unto my said executor in trust to sell, set over and transfer the same at such price or prices as in his judgment or the judgment of his successor or successors may be deemed expedient or necessary and after dividing the proceeds thereof into six (6) equal parts to retain one of said parts for his own use and benefit, and to forthwith pay over one of said parts to my daughter Maude E. Boyden, one to my daughter Ethel G. Carpenter and one to my son William C. Eberly, retaining the remaining two-sixths part in trust for my wife Amelia E. Eberly upon the trusts hereinafter set forth; the child or children of any of my children which may die during my lifetime to take the share to which its or their deceased parent would have been entitled.

ITEM 4: I will and direct that the **TWO-SIXTHS SHARE OR PORTION** of my real and personal estate **HEREIN DEMISED AND ALLOTTED** to my said wife Amelia E. Eberly shall be hers for her life only and shall be held by my said executor, his successor or successors, in trust for her sole and exclusive use and benefit during the period of her natural life, with power and authority to my said executor to invest and re-invest the same, and **THE INCOME AND REVENUES DERIVED THEREFROM** to pay over to my said wife **IN EQUAL SEMI-ANNUAL INSTALLMENTS** so

long as she shall live, and upon her death to forthwith divide the same among himself and my three other children hereinbefore named in equal proportions, share and share alike, the child or children of a deceased child to take the share to which its or their deceased parent would have been entitled. IT IS MY WILL, SINCE MY SAID WIFE IS POSSESSED IN HER OWN RIGHT OF A COMPETENCY AND INCOME SUFFICIENT FOR HER NEEDS, WHICH SAID COMPETENCY AND INCOME HAVE BEEN ACQUIRED BY HER CHIEFLY THROUGH MY AID AND EFFORT EXPENDED IN HER BEHALF BOTH BEFORE AND SINCE OUR MARRIAGE, that the portion of my estate demised in trust for her use and benefit in this my Last Will and Testament BE ACCEPTED BY HER IN LIEU OF HER RIGHT OF DOWER AND ANY AND ALL CLAIMS AGAINST MY ESTATE.

NO RENUNCIATION REQUIRED

Proposition No. 1

Section 1176 of the Code provides:

"IF IN EFFECT, NOTHING SHALL PASS BY SUCH DEVISE, SHE SHALL NOT BE THEREBY BARRED."

The applicability of the above quotation from Section 1176 may not at first glance be entirely apparent, inasmuch as the account filed in the S. G. Eberly estate actually distributes the sum of \$205.50 to the Appellants. That sum is stated to be one-third of the net income from Mr. Eberly's estate from his death on August 24th, 1927, to the date of Mrs. Eberly's death on October 20th, 1927.

However, if, under a proper construction of Mr. Eberly's will, that sum was not in fact payable to Mrs. Eberly's estate. THEN, IN EFFECT, NOTHING PASSED UNDER THE WILL TO MRS. EBERLY. Consequently, by the express terms of the statute, the widow would not be thereby barred of her legal share of Mr. Eberly's estate.

The executor can not deprive the widow of her legal share by awarding her money to which she is not entitled under the will. The will of the testator controls, not the executor's decision as to what the testator could or should have done. It follows that the allowance of this small sum of \$205.50 cannot be held to be a bar to the widow's share unless the testator directed that such an allowance should be made.

The question, then, is:—Was Mrs. Eberly entitled to one-third of the income from her husband's estate for the period of 57 days intervening between Mr. Eberly's death and her own death? She was not so entitled unless the testator directed that it should be paid to her. It is to be noted that the testator did not bequeath to her one-third of the income from his estate for her life. That is what the executor seems to have assumed was done, but that is not what the testator did do.

Mr. Eberly bequeathed all his personal estate to his executor, directing that it be sold, and the proceeds divided into six equal parts, one part being given absolutely to each of his four children, and that the remaining two-sixths part be held in trust for his wife, the trustee paying "the income and revenues DERIVED THEREFROM" to her for life in equal semi-annual installments.

At the time of Mrs. Eberly's death these directions had not been carried out. The fund had not been created as the testator directed. Consequently no income could be

“derived therefrom.” and, in effect, nothing passed to the widow under the will.

The rule, established by the Supreme Court of the United States in the case of

Hawaiian Trust Co. v. Von Holt, 216 U. S. 367,

in construing a will, the terms of which were substantially like the one here in issue, may be stated to be—

That where a will provides for the creation of a trust fund, and for the payment to the widow of one-third of the income therefrom, she is not entitled to that portion of the income from the death of the testator, but only from the date of the completion of administration by the executors, and the transfer of the property to the trustees as such.

Even though five years intervened between the death of the testator and the distribution, that Court held the widow was not entitled to any of the income which accrued during that period.

There, as here, the offices of executor and trustee were held by the same individuals. There, as here, the provision was stated to be in lieu of dower. In fact, so great is the similarity between the provisions of the two wills creating trust estates in favor of the widows, that the opinion of the Supreme Court can be paraphrased by the insertion of several words from Mr. Eberly's will and thus used as the basis of the argument in this case.

To paraphrase the Court's opinion, 216 U. S. 367, at P. 370:—

It is said that the provision is in lieu of dower and that the will as construed leaves her worse off than if there had been no will. — However that may be,

the words are explicit. The fourth clause purports to deal only with "the two-sixths share or portion of my real and personal estate herein demised and allotted to my said wife." (R. p. 2.) That phrase dominates the whole clause. It is the "income and revenues derived therefrom" that are to be paid over to the widow. Here, too, the portion which was to be held in trust for the widow was clearly separated from the remainder of the estate. — What the testator gave was not one third of the income generally, but the income from the "two-sixths—share or portion demised and allotted" to his wife, which was to be "retained in trust" by Raymond G. Eberly.

And as the Supreme Court there stated, cases relating to bequests of one-third of the income of an estate generally, and it might also be said, relating to bequests of income from specific sums of money, are not in point. In such cases, the courts have occasionally held that the testator may have intended that the income was to be used for the support of the legatee, and that hence the legatee was entitled to the income which accrued from the date of the testator's death. In the case at bar, however, it appears from the will that the testator had no such intention, as he knew and expressly declared that his widow was already "possessed in her own right of a competency and income sufficient for her needs." But, most important, in the case at bar as in the case in the Supreme Court, the widow was only entitled to the income to be derived from a certain fund created in a definitely specified manner.

This distinction between an ordinary bequest of income and a bequest of income to be derived from a certain fund has also been recognized by the State courts in several cases:

Clayes vs. Nutter, 49 Cal. App. 148, 192 Pac. 870

Jasper vs. Jasper, 170 Ore. 590, 22 Pac. 152

In re Brown's Estate, 143 Cal. 450, 77 Pac. 160

in each of which it was held that the legatee was only entitled to that portion of the income which accrued after the time when the fund was turned over to the trustee as trustee (the offices of executor and trustee being held by the same individuals in each case).

If the executor can ignore the terms of his testator's will; if he can exercise his own judgment as to what should be done; in short, if the executor can substitute his own will for that of the testator, then the executor in the case at bar could properly award the sum of \$205.50 to the widow's estate. But it is submitted that is not the law; that the executor can not disregard the instructions contained in the will of his testator; that he must in all respects comply with his testator's directions, and that in so doing he is bound by the law as expounded by the Supreme Court of the United States.

Why, then, should not this Court say, as the Supreme Court said in the case cited, "Nevertheless, we think that any doubts are artificial, and agree — that the language of the will is too clear to admit any interpretation but one." Since the terms of the two wills are substantially alike, they would appear to be governed by the same rules of construction, and so interpreted, the allowance of \$205.50 was improper. CONSEQUENTLY, AS NOTHING PASSED UNDER MR. EBERLY'S WILL, HIS WIDOW WAS NOT REQUIRED TO RENOUNCE.

NO RENUNCIATION REQUIRED

Proposition No. 2

Section 1176 declares that "a widow accepting or abiding by a devise shall be considered as a purchaser with a FAIR CONSIDERATION."

What is the meaning of the term "fair consideration" in this connection? The term is found in a Maryland statute, subsequently adopted and made applicable to the District of Columbia. In the absence of express decision by the Courts of the District, the decision of the Maryland Court of Appeals should be given great weight.

"The sound and just rule must be, that she is to be considered as a purchaser of the devise to the value of her share or legal right."

Thomas vs. Wood, 1 Md. Ch. s. p. 291, at 301

Coomes vs. Clements, 4 Harris & Johnson, s. p. 480, 484.

Do the words "A FAIR CONSIDERATION" import that the provision in the will must be substantially equivalent in value to that of her right under the law?

The provisions of Section 1176 substantially adopt and follow the wording of the Maryland Act of 1798, Ch. 101, sub. ch. 13, section 5, now codified as Section 314 of Article 93 of the Maryland Code, which has been before the Maryland Court of Appeals on numerous occasions, and the language of that Court indicates a consistent construction of its terms to the effect that the value of the testamentary provision must be substantially equivalent to that of the legal right.

"There is a further consideration why the legacy left to the testator's wife in the will should be held as

having vested in her at the testator's death. The bequest was, by operation of law, in bar of her share of her husband's estate. Code, Art. 93, sec. 291, et seq. (now Art. 93, sec. 310-314), and in accepting it she is to be considered as a purchaser with a fair consideration. Code, Art 93, sec. 295 (now Sec. 314). It is to be presumed, therefore, that the testator in making the provision he did for his wife intended it should be commensurate in value with the rights in respect to his estate that she was expected to surrender, and that it should be something more substantial than a mere contingency."

Daughters vs. Lynch, 93 Md. 305, 309.

"If the devise to the widow is invalid to such an extent as to make what she receives under the will less in value than her legal share of her husband's estate, she should be recompensed out of the residue thereof, so far as to place her in the same situation as if she had renounced the will."

Thomas vs. Wood, 1 Md. Ch. (s. p.) 296, 301.

"It is consonant to justice that a widow accepting or abiding by a devise, in lieu of her legal right, shall be considered as a purchaser with a fair consideration if the devise proves invalid or inoperative. A purchaser of what? Her share or legal right, because that which was intended as an equivalent has proved to be of no value, and he dies interstate of his personal estate as to his wife."

Coomes vs. Clements, 4 H. & J. 483.

The case just cited is approved by this Court in the case of *Jordan vs. American Security & Trust Co.*, supra.

Where a decree of the lower court, founded on a creditor's bill, made no provision for the protection of the rights of the widow, who had accepted the provision made by her husband's will, it was reversed because her rights

had not been protected, the Court using the following language:

“There is no intimation in the bill, or proof in the case, that the provision made for the wife is fraudulent, in being greater than her common law rights, and therefore unjust and injurious to creditors. She is, therefore, entitled to the benefit of all bequests and devises made to her by the will as a purchaser for a fair consideration.”

Gibson vs. McCormick, 10 G. & J. 65.

Further in a later case, where a husband, dying testate, by his will provided that the major portion of his estate should go to a named son, and required that son to pay the widow \$5.00, the gross estate being but \$1315, it was held there was no necessity for a renunciation, and that the widow was entitled to her legal share, although nearly three years had elapsed since the statement of the final account of the executors.

Malkus vs. Richardson, 124 Md. 224.

And this contention finds further support in the language used by this Court in the case of *Jordan vs. American S. & T. Co.*, 38 D. C. Appeals, at page 397, where it is stated:

“There, as we have seen, if that which was intended by the husband AS AN EQUIVALENT turns out to be in effect of no value, he is deemed to have died intestate of his personal property as to his wife. Any other rule thwarts the purpose of the statute, when it is considered in the light of its history.”

If then, as is contended, the provision made for his widow by her husband's will, in order to put her upon her election, both at common law and under the statutes, must be substantially equivalent in worth to the value of her legal right, the first inquiry is as to the value of the provision made for Mrs. Eberly by her husband.

At his death, she was 69 years old; the distributable net assets of his estate, after debts and expenses, were \$125,901.79 (R. p. 24); her legal share, one third, had a value of \$41,967. His will at most gave her the income for life from one-third of the estate through a trustee.

Her legal share, in her own hands, in view of the record evidence of her saving, frugal disposition, would certainly have produced as much income as she would have received through the trustee, when the expenses incident to trusteeship are considered. As the taker of her legal share, she would have been vested with the principal, to be disposed of by her will as she saw fit. Logically then, the will of her husband gave her nothing.

But, assuming that the trust created for the payment of income be treated as in fact providing an income for her life, it is matter of common knowledge that suitable trust investments can not be obtained, paying a higher rate than 5%, at which rate, after deducting the expenses of administration, the annual income produced would be less than \$2,000 per year.

Of course, a fixed income for life has a present value, dependent on the age of the recipient. The life estate of a woman, 69 years old, in a \$42,000.00 estate, according to

Equity Rule 67, p. 80

Rules of Supreme Court, D. C.

has an apparent present value of \$9,000.00. Such a life tenant would perhaps have great difficulty in securing a

purchaser for that amount, as those with a penchant for gambling would probably prefer the quicker action and decreased suspense of the race track or the stock market.

We contend that a husband who attempts to gamble on the duration of his wife's life must at least offer an equivalent before he can require her to decline his offer, or be penalized by the loss of her legal rights. She can only be compelled to renounce where she is offered a "fair consideration" for the relinquishment of her legal rights.

NO RENUNCIATION REQUIRED

Proposition No. 3

The question here involved is whether the provision claimed to have been made by Mr. Eberly for his wife in the Third and Fourth Items of his will (Record, p. 2) was of such a character as to require a renunciation and election on her part.

"The protection of the wife and the securing to her of a reasonable proportion of her husband's estate has ever been the policy of the law."

Jordan vs. American S. & T. Co., 38 D. C. Apps. 394.

As the wife of Samuel G. Eberly, she became ENTITLED at his death to one-third of the personal estate then owned by him (District of Columbia Code, Section 375), OF WHICH SHARE HE COULD NOT BY WILL OR OTHERWISE DEPRIVE HER. This right to receive a part of the estate of which her husband was possessed at the time of his death is usually referred to as a MARITAL RIGHT, and depended upon Mrs. Eberly's

status as the wife of the decedent at the time of his death and upon the statutes of distribution and descent. While she had no control over or interest in his personal estate in his life time, nevertheless HER RIGHT TO RECEIVE A PART OF THE ESTATE POSSESSED BY HIM AT HIS DEATH WAS SUBSTANTIAL AND DEFINITE.

Jaworski vs. Wisnieski, 149 Md. 109, 115 (and cases cited).

Since it is not in the power of a husband BY WILL DIRECTLY TO DEPRIVE HIS WIDOW OF THE PORTION OF HIS PERSONAL ESTATE TO WHICH she is entitled by law

Hays vs. Henry, 1 Md. Ch. 337, 339.

and he is not permitted to deprive her of that right during his life by any transfer which leaves in him dominion over the property, it follows that at common law he could not deprive her of her reasonable share of his estate, either directly or indirectly.

Jordan vs. American S. & T. Co., *supra*, p. 394.

Therefore, it seems to follow as a necessary conclusion that a husband can not by any trick, device or subterfuge, accomplish indirectly what he could not do by direct means.

The legal right of the widow Eberly was one-third of her husband's net personal estate, to be held by her absolutely, this right being of a value of \$41,967; her husband's will gave her but a contingent right to the income of one-third of his estate, predicated upon the continuance of her life to the period when the formal administration was concluded and the property was turned over to the appointed trustee.

If the interest provided for her be construed as a vested life estate, at her age, its value did not exceed \$8,992.00, according to the tables established by Rule 67 of the District of Columbia Supreme Court Rules.

On the other hand, if the rule announced by the Supreme Court in the case of *Hawaiian Trust Co. vs. Von Holt, supra*, is applied, she received nothing.

In any event, it is clear that her husband's intention was to defeat her interest in his estate by setting up a false state of facts, designed to apparently display a proper division for her, while in fact giving her, at the best, an interest having a value of only about 20% of that to which she was entitled, and at the worst, nothing at all.

This Court decided in the case of *Jordan vs. American S. & T. Co., supra*, that such an attempt by subterfuge to deprive a widow of her legal right would not be permitted.

The language of this Court in the opinion in the *Jordan Case, supra*, when applied to the facts of this case, shows clearly the close affinity of that case to the one at bar.

The recital in Mr. Eberly's will that his "wife is possessed in her own right of a competency and an income sufficient for her needs, which competency and income have been acquired by her chiefly through my aid and effort expended in her behalf both before and since our marriage" was not in accordance with the facts. Mrs. Eberly's competency and income arose solely and only from her own industry and frugality, as a result of which she had accumulated assets of about \$60,000, for the acquirement of which Mr. Eberly was in no way responsible, and to which he made no contribution.

The situation confronting us therefore comes to this:

A husband with a net personal estate, amounting in value to \$125,901.00, one-third of which would vest in his wife in the absence of a will, leaves a will in which he in effect says that, having previously provided her with an income and competency sufficient for her needs, he intends to deprive her of her legal share of his estate, amounting to \$41,967, by providing a trustee for her, who will pay to her the income on the amount she is legally entitled to for her life. This recital is found to be incorrect and untrue.

Can the husband by such a subterfuge penalize his widow, and her estate, in the event she dies within 38 days of the probate of his will, and before any inventory is filed in his estate, because she has not prior to her death filed a renunciation and election in the Probate Court, although she has declared her renunciation and election verbally, when no rights of third parties intervene, and the executor of the will has been notified that she has renounced the will and elected to take her legal share?

In the *Jordan Case*, *supra*, this Court declined to approve such a subterfuge, and it is now contended that the facts of this case approximate those existing in that case so closely that the same principles should be here applied, and a like result attained.

MRS. EBERLY DID RENOUNCE THE WILL AND ELECT TO TAKE HER LEGAL SHARE

The second question arising on this appeal will not require decision if the first question submitted, viz., Was a renunciation by Mrs. Eberly required? is answered in the negative.

If, however, it is determined that a renunciation by her was required, then the Appellants contend that the facts in this case demonstrate that she, in fact, made a renunciation and election; that it was evidenced by writing as required by Section 1173; and that the written evidence of her decision was filed in the Probate Court of the District within six months after the probate of her husband's will.

The important facts in this connection, briefly restated, are that her husband died August 24, 1927; after his will was read she declared verbally her dissatisfaction and purpose to take her legal share, both to the executor and others; on September 12, 1927, her waiver of citation was procured, and its language might well be understood by a lay mind to constitute an exercise of her right; on the same date, the will was probated; she subsequently again declares her renunciation and choice to take her legal share; on October 11, 1927, in writing by her will she declares herself entitled to a "widow's right," and thereby disposed of all of that she expected to receive as her husband's widow; that writing was filed in the Probate Court on October 26, 1927; and on December 8, 1927, the claim of her estate to receive her thirds was filed in the Estate of S. G. Eberly, then being administered in that court, accompanied by a certified copy of her will.

The first proposition advanced by the Appellants is that the renunciation and election referred to in the statutes is not two distinct and separate acts, but that it is accomplished by a single decision—the choice between two alternatives.

When by the probate of a husband's will his offer is made to his widow to substitute something else for her legal rights, and she arrives at a decision as to her course, and

rejects the will, she has made both a renunciation and election.

The widow Eberly had thus in fact made her choice between the alternative rights she had, but, though her decision continued unchanged, she did not prior to October 11, 1927, provide the written evidence of her decision which the statute required. On that day she executed her will, and by it committed to writing the choice she had made, thus providing the written evidence of her choice as required by the statute.

If it be argued that a will is ambulatory, and may be revoked by the testator up to the moment of his death, that argument can not avail in the face of the averment and admission by the Appellee that it was never revoked.

At any rate, once executed, a will can not be revoked by a mere purpose or intention. It remains in full force and effect unless some one of the methods required by Sec. 1626, Chap. 59, Title "Wills" of the District of Columbia Code is adopted by the testator and by him alone. Mrs. Eberly never revoked her will in fact, nor intended to do so. It was made during the fatal illness from which she was suffering at the time of its execution, in the belief that her end was near, and by it she makes the unqualified choice of her legal rights in her husband's estate, to which she therein claims to be entitled, disposing of the resultant money, securities or other property which would thus accrue to her according to her vision of justice and right. Her choice of her legal rights was a renunciation of the provision made by his will.

Her will, containing her renunciation and election, having been made, she committed it to the keeping of Alva W. Voyce, knowing that he would be compelled to file it in the Probate Court of the District of Columbia, the

place in which her renunciation and election was required to be filed.

As its custodian, Voyce had but one duty, and that to file the will in the Probate Court. This act of filing by him was not merely imposed by the command of the testatrix, but was a legal duty imposed by statute.

Sec. 1635a, District of Columbia Code.

and this statutory duty to file was further enforced by the pains and penalties imposed by—

Sec. 830 of the District of Columbia Code.

By handing her will to Alva W. Voyce the executor therein named, Mrs. Eberly in effect made him her agent to file it with the Register of Wills, for under the statute it became his absolute duty to “immediately” after opening and reading it to file it with the Register of Wills. (Section 1635a, D. C. Code.) It could be contended in the ordinary case that an agency is revoked by death, but here the duty imposed upon Voyce was in fact created by death, for instead of the agency being revoked by the death of Mrs. Eberly, a theretofore executory obligation became absolute and mandatory on the part of Voyce, the agent.

Thus she performed the act of renunciation and election; thus she created the written evidence required by Sec. 1173; and thus that written evidence was filed in the appropriate place.

The principle, supported by many decisions, that the right to elect is personal to the widow, and cannot be exercised by her representatives will undoubtedly be relied upon by the Appellee. The Appellants have no

place in which her renunciation and election was required to be filed.

As its custodian, Voyce had but one duty, and that to file the will in the Probate Court. This act of filing by him was not merely imposed by the command of the testatrix, but was a legal duty imposed by statute.

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Thus she performed the act of renunciation and election; thus she created the written evidence required by Sec. 1173; and thus that written evidence was filed in the appropriate place.

The principle, supported by many decisions, that the right to elect is personal to the widow, and cannot be exercised by her representatives will undoubtedly be relied upon by the Appellee. The Appellants have no

Other citations of authorities could be made in support of this statement, but one good, well reasoned case is superior to many loosely written opinions, and the Appellants earnestly commend to the Court's perusal the case of

McAllister vs. Brand, 50 Kentucky 370.

in which all phases of the law relating to widow's renunciations are carefully considered.

It is asserted that no case can be found, holding that a renunciation and election can not be made by the will of a widow, where that will definitely and specifically refers to and disposes of her thirds, as part and parcel of her estate, and that will is duly filed in the probate court, as the basis of her claim to take her legal share, within the statutory period.

It is, therefore, contended by the Appellants that this record clearly establishes a decision by Mrs. Eberly to reject the provision of her husband's will; a determination to take her legal right; the reduction of that decision and determination to writing; a disposition of the property to be acquired as a result of her decision; and the actual filing of the written evidence of her renunciation and election in the Probate Court of the District of Columbia, first in the proceedings in her own estate on October 26, 1927, and later in the Estate of Samuel G. Eberly, her husband, on December 8, 1927, all of which was accomplished within less than four months from the probate of his will.

CONCLUSION

It is therefore submitted that no renunciation was in fact necessary, for the reasons that:

1. Nothing in effect passed under the will of S. G. Eberly as the trust fund had not been created at the time of Mrs. Eberly's death, and no income could be "derived therefrom."

2. If anything, in effect, did pass, the amount thereof was not substantially equivalent to the "widow's share" and thus it cannot be deemed "a fair consideration."

3. Because of the misrepresentation in the will of S. G. Eberly, coupled with the meagreness of the provision for the widow.

And it is further submitted that, although the circumstances of the case required neither renunciation nor election, each has in fact been made by the widow, evidenced by writing signed by her, and that writing filed in the proper place and within the proper time, thus giving notice to those who may be interested of her decision within the time limited by law.

It is therefore respectfully submitted that for the reasons stated herein the judgment of the lower court should be reversed.

RALPH B. FLEHARTY,
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Attorneys for Appellants.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 13 1929

Henry M. Hodges

IN THE

Clerk,

Court of Appeals, District of Columbia

APRIL TERM, 1929.

No. 5020.

SPECIAL CALENDAR.

WINFIELD S. CAHILL and ALVA W. VOYCE,
Administrators, C. T. A. of Estate of
AMELIA E. EBERLY, Deceased, *Appellants*,

v.

RAYMOND G. EBERLY, *Executor.*

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLEE.

GEORGE W. OFFUTT,
ROSS H. SNYDER,
Attorneys for Appellee.

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BRIEF ON BEHALF OF APPELLEE.

I.
FACTS.

Insomuch as the statement of facts made by the appellants contains so many matters outside of the Rec-

ord, we feel that it is proper to call to the Court's attention the facts which the Record discloses.

Samuel G. Eberly died in the city of Washington, in the District of Columbia, on August 24, A. D., 1927, testate, leaving four children, by a prior marriage, Ethel G. Carpenter, Maude E. Feeley, William Eberly and Raymond G. Eberly, and a widow, Amelia E. Eberly, who had no children for whom she desired to provide in the event of her death (R. p. 23, 4, 5, 6). He left a last Will and Testament, bearing date the 9th day of April, 1918, which, among other things, contained the following provisions for his widow:

“Item 2: All of my real estate, including that which I now own as well as that which I may own or to which I may be in any manner entitled at the time of my death, I give and devise to my executor hereinafter named, his successor or successors, in trust to sell and convey the same or any part thereof, in fee simple, at such time, for such price and upon such terms as in his judgment or in the judgment of his successor or successors may be to the best interests of my estate, without liability on the part of any purchaser or purchasers thereof to see to the application of the purchase money received therefor, and the proceeds of said sale or sales to divide into six (6) equal parts, retaining one of said parts for his own use and benefit, paying over one each of said parts to my daughters, Maude E. Boyden and Ethel G. Carpenter and my son, William C. Eberly and retaining two (2) of said parts for the use of my wife, Amelia E. Eberly, subject to the limitations and upon the trusts hereinafter provided for with respect to her share of my personal property, the child or children of any of my children which may die during my lifetime, to take the share to which its or their deceased parent would have been entitled.

“Item 3: All of my personal property of every kind and description, I bequeath unto my said executor in trust to sell, set over and transfer the same at such price or prices as in his judgment or the judgment of his successor or successors may be deemed expedient or necessary and after dividing the proceeds thereof into six (6) equal parts to retain one of said parts for his own use and benefit and to forthwith pay over one of said parts to my daughter Maude E. Boyden, one to my daughter, Ethel G. Carpenter and one to my son William C. Eberly, retaining the remaining two-sixths part in trust for my wife, Amelia E. Eberly, upon the trusts hereinafter set forth; the child or children of any of my children which may die during my lifetime, to take the share to which its or their deceased parent would have been entitled.

“Item 4: I will and direct that the two-sixths share or portion of my real and personal estate herein demised and allotted to my said wife Amelia E. Eberly shall be hers for her life only and shall be held by my said executor, his successor or successors, in trust for her sole and exclusive use and benefit during the period of her natural life, with power and authority to my said executor to invest and reinvest the same, and the income and revenues derived therefrom to pay over to my said wife in equal semi-annual installments so long as she shall live, and upon her death to forthwith divide the same among himself and my three other children hereinbefore named in equal proportions, share and share alike, the child or children of a deceased child to take the share to which its or their deceased parent would have been entitled. It is my will, since my said wife is possessed in her own right of a competency and an income sufficient for her needs, which said competency and income have been acquired by her chiefly through my aid and effort expended in her behalf both before and since our marriage, that

the portion of my estate demised in trust for her use and benefit in this my last will and testament be accepted by her in lieu of her right of dower and any and all claims against my estate.” (R. p. 1, 2, 3.)

He left no real estate.

Immediately after the publication of her husband's will, the widow, Amelia E. Eberly, expressed a determination to renounce the provisions of the Will in her favor and take the share of her husband's estate given her by law. (R. p. 13, 23) (Appellant's Brief, p. 6.)

The Will was filed with the Register of Wills on August 29, 1927, but was not admitted to probate until September 12, 1927, at which time the widow, Amelia E. Eberly, signed the following waiver of citation:

“Without waiving any right which I may have to renounce any or all of the provisions of the Will of Samuel G. Eberly made in my behalf and expressly reserving the right to take from the estate of Samuel G. Eberly, the share which the law allows me to take, exclusive of the provisions of the will, I hereby waive all citation in the above-entitled cause and consent that letters testamentary issue unto Raymond G. Eberly as provided in said Will, and in case I shall renounce the provisions in said Will made for me, I consent that the said Raymond G. Eberly shall still act in all respects as executor and as administrator of the estate of Samuel G. Eberly, deceased.” (R. p. 4.)

Thereafter Raymond G. Eberly, the executor designated in and by the said last Will and Testament was duly appointed as such, qualifying by giving the undertaking in the amount prescribed by the Order of Court. Later, the widow, Amelia E. Eberly, left Washington,

on or about the first of October, 1927, for a visit with relatives in Baltimore, Maryland. During this visit, she became seriously ill and on October 11, 1927, made and executed her last Will and Testament, which contained, among other things, the following provisions:

“Item V. Inasmuch as I am entitled to a widow’s share in the estate of my deceased husband, Samuel G. Eberly, I give and bequeath to each of the following of my step-children (children of my said husband), the sums specified after each of their names, as follows:

“To Raymond G. Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3,000.00);

“To William Eberly of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3,000.00);

“To Maud E. Feeley, nee Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3,000.00);

“To Ethel G. Carpenter, of Washington, D. C., the sum of One Thousand Dollars (\$1,000.00); each and every, of said sums, so bequeathed to be paid out of such money, securities, or other property as shall accrue to me out and in connection with the settlement of my deceased husband’s estate, now in course of administration, and from no other source whatever, and in event the share thereof allotted to me shall be insufficient to pay such sums in full, then each bequest herein made shall abate proportionately in amount.” (R. p. 5.)

Thereafter on October 20, 1927, Amelia E. Eberly died. Her Will was filed with the Register of Wills of the District of Columbia, on the 26th day of October, 1927, and by order passed on October 31, 1927, was duly admitted to probate, and Winfield S. Cahill and Alva W. Voyce, were duly appointed as administrators

cum testamento annexo thereof, afterwards qualifying as such by giving the undertaking provided in the order of their appointment.

Thereafter on the 8th day of December, A. D., 1927, said Alva W. Voyce and Winfield S. Cahill, administrators, filed a petition in the cause of "In re: Estate of Samuel G. Eberly," claiming that Amelia E. Eberly had, by the aforesaid language in her said last Will and Testament, renounced the provisions of her husband's will made for her, and had elected to take the share of said estate of Samuel G. Eberly allotted to her, as his widow, by law, and claimed that by reason of this fact, they, as administrators, as aforesaid, were entitled, in the distribution of the personal estate of said Samuel G. Eberly, to one-third thereof, of his estate, notwithstanding the provisions of said Will.

Thereafter the said Raymond G. Eberly, executor, filed his final account, in which he sought to distribute equally to the four children of said Samuel G. Eberly, all of the net principal of his said estate, and by said account, planned to distribute the sum of Two hundred, five dollars and fifty cents (\$205.50) to the legal representatives of the estate of Amelia E. Eberly, the sum being stated to be one-third of the net income of the estate from August 24, 1927, the date of the death of Samuel G. Eberly, to October 20, 1927, the date of the death of Amelia E. Eberly.

Thereafter on April 8, 1927, the said Winfield S. Cahill and Alva W. Voyce, administrators, as aforesaid, filed exceptions to the said account, claiming in and by said written exceptions:

1. That Amelia E. Eberly did, in her last Will and Testament dated October 11, 1927, renounce

the provisions of her husband's will made for her benefit, and declare her election to take that share of the estate of said Samuel G. Eberly allotted her by law rather than any amount that might be due her by way of demise or bequest contained in said Will (R. p. 13).

2. That the statement in his Will made by Samuel G. Eberly, that the competency and income of the said Amelia E. Eberly had been acquired chiefly through his aid and effort expended in her behalf, was not true, not denying, however, the statement that she was possessed, in her own right, of a competency and an income sufficient for her needs. (R. p. 15.)

3. That by reason of these facts they, as legal representatives of Amelia E. Eberly, were entitled to one-third of the estate of Samuel G. Eberly.

Thereafter the said exceptions were overruled and an order was passed approving the said final account of the executor herein.

The record does not disclose the age of the widow or the fact that Samuel G. Eberly was a widower when he first met her, as contended in the fact as stated by the appellants. It discloses no statements made by the widow herself other than those set forth on page 13 of the Record, indicating her intention to renounce the provisions of her husband's will made in her behalf.

II.

ARGUMENT.

In order to properly present the questions arising in this case, a brief discussion of the facts is necessary.

After the death of Samuel G. Eberly and the read-

ing and publication of his last Will and Testament, in which she, as his widow, was bequeathed an equitable life estate in two-sixths of the entire estate of her husband, Amelia E. Eberly, immediately informed Raymond G. Eberly, executor named in the said Will, of her refusal to accept the provisions of the Will of her said husband made in her favor. (R. p. 13; Appellant's Brief, page 6.) Although the will was filed on August 29, 1927, it was admitted to probate on September 12, 1927, (R. p. 23; Appellant's Brief, p. 7.) p. 7.) Appellants in their brief comment on this as follows:

“There seems to be no reason for the delay in its probate except that the widow's dissatisfaction with its terms, especially as to the claim that her ‘income and competency’ was due to her husband's efforts, was so great and so frequently expressed that the executor delayed action until her consent to its probate could be obtained.” (Appellant's Brief, p. 7.)

On September 12, 1927, the widow signed the following waiver:

“Without waiving any right which I may have to renounce any or all of the provisions of the Will of Samuel G. Eberly made in my behalf and expressly reserving the right to take from the Estate of Samuel G. Eberly, the share which the law allows me to take, exclusive of the provisions of the Will, I hereby waive all citation in the above-entitled cause and consent that letters testamentary issue unto Raymond G. Eberly as provided in said Will, AND IN CASE I SHALL RENOUNCE THE PROVISIONS IN SAID WILL MADE FOR ME, I CONSENT THAT THE SAID RAYMOND G. EBERLY SHALL STILL ACT IN ALL RE-

SPECTS AS EXECUTOR AND AS ADMINISTRATOR OF THE ESTATE OF SAMUEL G. EBERLY, DECEASED.”

This clearly indicates that even after her immediately expressed determination to renounce the provisions in her favor of her husband's will and take a widow's share (Appellant's Brief, p. 6), she had not made up her mind finally as to what she would do. The language of the waiver is further indicative of the fact that the widow had in mind that it was necessary for her to do something thereafter to finally bring about her renunciation of the provisions of the Will made in her behalf. Thereafter the widow died during the period in which she could have renounced the provisions of her husband's will.

The case then presents two questions:

1. Whether under the circumstances of the case, it was necessary for the widow to renounce the provisions in her husband's will made in her favor in order that after her death her legal representatives might take the share of her husband's estate allotted to her by law.

2. Whether the language of a will of the widow, never intended by the testatrix to be filed in the Probate Court except in the event of her death, containing none of the language prescribed by our Code or any similar verbiage, filed in the Probate Court after her death, can operate as a renunciation of the provisions of her husband's will made in her favor, so as to give to her legal representatives the share which she would have received in the event of her having renounced the provisions made for her in the said will.

1.

IN ORDER THAT HER LEGAL REPRESENTATIVES MIGHT OBTAIN HER LEGAL SHARE OF THE ESTATE OF HER HUSBAND, IT WAS NECESSARY FOR AMELIA E. EBERLY TO PERSONALLY RENOUNCE THE PROVISIONS OF HER HUSBAND'S WILL, AND ELECT TO TAKE THE SHARE OF HIS ESTATE ALLOTTED HER BY LAW, IN THE MANNER AND FORM PRESCRIBED BY THE DISTRICT OF COLUMBIA CODE AND IN ADDITION THERETO TO FILE SUCH WRITTEN RENUNCIATION IN THE PROBATE COURT.

The sections of the Code of the District of Columbia applicable to the situation are as follows:

“Sec. 1172. Devise in Lieu of Dower.—Every devise of land or of any estate therein, or bequest of personal estate to the wife of the testator, shall be construed to be intended in bar of her dower in lands or share of the personal estate, respectively, unless it be otherwise expressed in the will.”

“Sec. 1173. Renunciation of Devises and Bequests.—A widow shall be barred of her right of dower in the land and share in the personal estate by any such devise or bequest unless within six months after administration may be granted on her husband's estate she shall file in the probate court a written renunciation to the following effect: ‘I, A. B., widow of, late of, deceased, do hereby renounce and quit all claim to any devise or bequest made to me by the last will of my husband exhibited and proved according to law; and I elect to take in lieu thereof my dower and legal share of the estate of my said husband.’ If, during said period of six months,

a suit should be instituted to construe the will of her husband, the period of six months for the filing of such renunciation shall commence to run from the date when such suit shall be finally determined, by appeal or otherwise.

“By renouncing all claim to any and all devises and bequests, made to her by the will of her husband, she shall be entitled, in addition to her dower, to the distributive share of his personal property, which she would have taken had he died intestate, and, except in cases of valid antenuptial or postnuptial agreements, this provision for the wife shall apply with the effect (without formal renunciation) to cases where the husband has made no devise or bequest to his wife.

“By renouncing, within the period above prescribed all claim to any and all devises or bequests, made, to him by the will of his wife, the husband shall be entitled to the distributive share in her personal property which he would have taken had she died intestate, and, except in cases of valid antenuptial or postnuptial agreements, this provision for the husband shall apply with like effect (without formal renunciation) to cases where the wife has made no devise or bequest to her husband.”

“Sec. 1176. When Nothing Passed by the Devise.—If, in effect, nothing shall pass by such devise she shall not be thereby barred, whether she shall or shall not renounce as aforesaid, it being the intent thereof that a widow accepting or abiding by a devise in lieu of her legal right shall be considered a purchaser with a fair consideration.”

The bequest of an equitable life estate in personal property, is such a bequest of personal property as is contemplated by Section 1172 of the Code of the District of Columbia. So far as counsel has been able to discover, this immediate question has been determined

in only one recorded case, *Collins vs. Carman*, 5 Md. 503. The verbiage of the Statute of Maryland applicable to the subject (set forth in the Addenda) is identical with Section 1172 to 1176, inclusive, of the Code of the District of Columbia. In this case personal property was devised to trustees who were to hold said property for the use and benefit of the widow, who was insane prior to the date of her husband's will, and continued so until her death. Her administrators made claim, as in the present case, that no renunciation on the part of the widow was necessary; that nothing in reality had been given to her, but that the gifts were to others for the purpose of taking care of her. The Court in its opinion said as follows, on page 523:

“The clauses in the Will which are deemed important in the controversy are as follows:

“Out of the income of my estate and during the lifetime of my wife, Eliza, my trustees above named, will pay all taxes and repairs of my lot and house in High Street, in the City of Baltimore, in which I order and direct my trustees to take no account of the furniture, so as to have it removed, or disposed of; the said lot, house and furniture to be used by my wife, Eliza, free from any cost or charge to her during her life. My trustees will take an inventory of my books and furniture and give in special charge to the housekeeper, that they be not wasted or destroyed by neglect or imposition on the liberality of my wife. My trustees will employ a housekeeper, who will be kind and careful of my wife, Eliza, and I would give the preference to Ann Bell or Elizabeth Miller, with the wages and necessary maintenance for the comfort of my wife, Eliza.

“My trustees will pay to the niece of my wife, to wit, Susan H. Jones, Fifty dollars per month,

and monthly for the expenses of all the comforts and necessities that may be necessary for the family of my wife. My trustees will examine the accounts of Susan H. Jones, and for all moneys she may produce satisfactory vouchers for, they shall allow and pay her four per cent out of other moneys than the Fifty Dollars per month above mentioned. Any expenses of doctors or funeral charges for my wife, is not included in the Fifty Dollars per month above named."

No renunciation was made by the widow during her lifetime, she at the time being insane. At her death her executors attempted to claim the share of her husband's estate allotted to her by law, and among other things claimed that no renunciation was necessary. The Court in determining this on pages 524, 525, 526 said as follows:

"These facts are deemed sufficient to present the questions necessary to be decided. The first of which is, whether the provisions of the will, in regard to the widow are such devises of realty and bequests of personalty, within the meaning of the Act of Assembly, as created any necessity for a renunciation, assuming that where a widow is rendered incapable of renouncing, on account of insanity, her right of dower and share of personalty will be as effectually barred by the statute, as will similar rights of a sane widow, who fails to renounce in time.

"Inasmuch as the Act of 1798, Ch. 101, Sub-ch. 13, speaks of a devise or bequest 'to the wife,' it is insisted that the meaning and design of this language has not been complied with by the provisions made for the benefit of Mrs. Carman; nothing, in reality, having been given *to her*, but the gifts are *to others* for the purpose of taking care of her.

“Notwithstanding this is the argument now urged by the appellant, it is evident that the bill concedes or is based upon the assumption, that a renunciation would have been necessary if the widow had been of sound mind. And the written argument of the solicitors for the complainant in the Court below, which is also before us, is a very faint denial, if a denial at all, of the necessity for a renunciation in regard to the realty. On this subject, they say: ‘But our position is, that even if, in respect of the real estate, it can be said that there is a devise to her of the house for life, yet, that in respect of the personal estate, there is no bequest *to the wife*.’

“But independently of any actual or supposed concession, either in the bill or the argument, in our opinion, the provisions of the will, in relation to both species of property, were such as made it necessary for a renunciation under ordinary circumstances.

“In *Farwell v. Jacob*, 4 Mass. 634, the will directed the executor to support ‘in sickness and in health,’ the testator’s aged father. The executor having failed to execute the trust, letters of administration *de bonis non cum testamento annexo* were granted to the defendant. He also neglected to support the father, who instituted the suit to recover in damages a sum equivalent to the support and maintenance directed by the will. Upon a statement of facts, the Court held, that the plaintiff was entitled to a judgment against the estate in the hands of the administrator. Such a bequest, it was said, could be enforced by a Bill in Chancery, and damages are given at law, in consequence of there being no Chancery Court in that State. On page 636, C. J. Parsons says: ‘The direction to support and maintain the plaintiff, results from the bounty of the testator declared in his will, and must be considered as to the remedy, as a legacy.’ And therefore, the case was consid-

ered to be within the provisions of their State Law, which enacts, in general terms, 'that any person having a legacy given him may sue for and recover the same at common law,' page 635."

"By the will in *Tolson vs. Tolson*, 10 G. & J. 159, the testator gave the residue of his estate to his seven sons, and their heirs and assigns; and then added: 'I request my seven sons, above named, to take care of their brother, John Tolson and his family.' John and his family were in abject poverty, but received no support or relief from his brothers. The provisions in reference to the family was held void for uncertainty, but the seven sons were considered as trustees for John and responsible, in equity, for the payment of such sum as would be proper to compensate for his maintenance, since his father's death, and to secure the future payment of an annuity.

"If those two cases are to be regarded as recognizing correct principles, we do not perceive how it can be successfully contended that this will give nothing 'to the wife' of the testator. The lot, house and furniture are to be used by her free from cost or charge to her during her life. The sum of \$50.00 per month is to be paid by the trustees to Susan H. Jones, for the express purpose of furnishing 'the comforts and necessities' required '*for the family*' of the wife. In addition to this monthly sum, her doctor's bills are to be paid out of the husband's estate and upon all moneys disbursed by S. H. Jones for family expenses, she is to receive from the trustees four per cent. Under these provisions, who was the object of the testator's bounty, S. H. Jones or the wife? Most undoubtedly the latter. If so, had she become sane before six months subsequent to the testator's decease, and had renounced 'all claim to any bequest or devise made' to her by the will of her husband, and elected to take in lieu thereof her dower or legal share of his estate, we

suppose it could not be said that nevertheless, S. H. Jones, or any one else, could then have claimed anything further under the clauses of the will which have been referred to. If we are right in this supposition, these provisions in legal contemplation, must be gifts to the wife, within the meaning of the Act of 1798.

“But admitting it possible to entertain a doubt in relation to the Fifty dollars per month being a gift to the wife, how can there be any in regard to the house and furniture? The will declares they are *to be used by* my wife, Eliza, free from any cost or charge to her during her life. Thus she is entitled to the use of both for life. It is said, however, that the trustees are to take an inventory of the furniture and to give it in special charge to the housekeeper, and this is relied upon as manifesting an intention not to give it to the wife; but if it is to be in charge of the housekeeper, she is so to have it in charge for the use of the wife. It is only a cautious provision made in consequence of her insane condition, so as more effectually to preserve the property for her use. The house and furniture are for her use during life, and the testator speaks of the family as ‘*the family*’ of his wife.”

(1) ANSWER TO APPELLANT'S PROPOSITION NO. 1.

Appellants contend in Proposition No. 1, Appellant's Brief, p. 24, that nothing in effect passed to the widow by such devise because of the fact that she, during her lifetime received nothing, and that the allowance of Two hundred, five dollars and fifty cents (\$205.50) made to the widow as her share of the income of her husband's estate, during her lifetime was improper. This question was not submitted to the Court below, and has not been passed upon. The Court's attention, irrespective of this consideration, (of this income) is

directed to the language of the Code of the District of Columbia. Section 1176 provided "If in effect nothing *shall* pass by such devise, she shall not thereby be barred."

Appellants contend that by reason of the fact that the allotment of the sum of Two hundred, five dollars and fifty cents (\$205.50), the same being two-sixths of the income from the husband's estate, from the time of his death to the time of her death, to the legal representatives of Amelia W. Eberly is improper, that then nothing passed by the bequest in question. They lose sight of the fact that by the terms of the bequest, an equitable life estate was created in behalf of the widow, and that such estate did pass by this bequest. The words devise and bequest are used in the Code of the District of Columbia interchangeably. The attention of the Court is called to the language of the Code of the District of Columbia,

"If, in effect, nothing *shall* pass."

The attention of the Court is directed to the failure on the part of the Code to provide the words that it shall pass to the widow, and so long as it passes to one who is to use it for her benefit, the provisions of the Code of the District of Columbia are satisfied. *Collins vs. Carman, supra.*

The appellees contend that the fund allotted in the final account of the executor of the estate of Samuel G. Eberly to the widow's estate is proper. The case of *Hawaiian Trust Company v. Von Holt*, 216, U. S. 367, is cited as making the following determination:

"That where a will provides for the creation of a trust fund, and for the payment to the widow of one-third of the income therefrom, she is not en-

titled to that portion of the income from the death of the testator, but only from the date of the completion of administration by the executors, and the transfer of the property to the trustees as such.”

It is submitted that the case does not decide the question as general as this, but on the other hand, it holds that the widow is not entitled to the income from her deceased husband's real estate before the same comes in to the executors hands as trustees under a will directing the executors to obtain a decree of distribution as soon as made to the trustees living at the date of the decree of distribution who, “with respect to all property which shall be so distributed to them,” are to reduce the same to possession and manage it, collecting the rents and incomes and to pay over to the widow one-third of the income of the realty last aforesaid. The Court, in its opinion said in determining that the widow was not entitled to income except from the date of the distribution:

“It will be seen from the dates of the probate of the will, June 26, 1900, and of the decree turning over the property to the trustees, July 3, 1905, that probably a longer time was taken to finish the administration than the testator expected, and that if the widow did not have a right to her third of the income from the real estate until in fact the estate went to the trustees, she will lose a considerable sum that has accumulated in the meantime. The loss is made the more aggravating that the estate seems to have been ready for distribution on February 10, 1902. Nevertheless, we think that any doubts are artificial, and agree with the Supreme Court of Hawaii that the language of the will is too clear to admit any inter-

pretation but one. It is said that the provision is in lieu of dower, and that the will, as construed, leaves her worse off than if there had been no will. Whether that would be so or not, if we take into account that she is one of the executors and trustees, getting her share of the commissions, we do not know, or think of much importance. The testator seems to treat it as an open question whether she will accept the provision. However that may be, the words are explicit. The eighth clause purports to deal only with the 'property which shall be so distributed to them.' That phrase dominates the whole clause. It is the rents 'thereof' that they are to collect, as by clause one the executors were to collect all income before distribution; the accounts pertaining to the realty, that is the realty so distributed to them, are to be kept separate and the ninth clause gives the widow one-third of the income of 'the realty last aforesaid.' "

It can be plainly seen that no such language exists in the will of Samuel G. Eberly, and that while distribution had not yet been had, there is absolutely nothing in the will of Samuel G. Eberly which, like the will considered in *Hawaiian Trust Company vs. Von Holt, supra*, prevents, by its language, the payment of the income in question to the widow, but on the other hand, the implication of the Will directing the executor to sell the personal property of the estate and divide the same into six equal parts, not mentioning the disposition of the income, would indicate that the testator's intention was that his widow should receive her allotment of the income during the administration year. However, in our view of the case, this contention is unimportant, and in addition thereto, it was not called to the attention of the Court below.

(2) ANSWER TO APPELLANT'S PROPOSITION
NO. 2.

Answering Proposition No. 2, as stated on page 29 of Appellant's Brief, it is contended that it is not necessary that the equivalent, intended by a husband for his widow's legal rights, should be of equal value with the estate, which the law, independent of will, gives to her. The Courts have fully recognized the fact that the motives which may, and frequently do, operate upon the widow in making her choice between her rights under the will and under the law, are entirely different from the motives which would be effective in the case of the heirs or personal representatives. In the case of *Sherman vs. Newton*, 6 Gray (Mass.) 307, 308, and 309, the Court said as follows:

“Many reasons might induce her to acquiesce in the disposition of her husband's property which would be inconclusive and inefficient with them. The will may have been made in conformity to some arrangement mutually understood and consented to, though not having of itself any legal force; this, or, it may be, mere respect for his wishes or preception of the urgent wants or meritorious character of those whom he has chosen to make the objects of his regard and favor, might successfully prevail with her to forbear from disturbing his arrangements, though each of these considerations would wholly fail to have any effect upon the minds of those who, in the event of her death, would become entitled to her estate.”

In this connection, it must be remembered that the widow had no children for whom she desired to provide in the event of her death, whereas Samuel G. Eberly had four children, and the only objects of Amelia E. Eberly's bounty were her collateral next

of kin. It is true that Courts have held, and properly so, that where the bequest to the widow in a husband's will is so small as to make it apparent on the face of it, that it was not intended as a provision at all for her, but was purely nominal, then and in that event the Courts, looking to the intention of the husband will hold that nothing shall pass by the Will as provided in Section 1176 of the Code of the District of Columbia ~~and~~.

To hold that the question of the relative value of the bequest, and of the personal estate, where the bequest is not purely nominal, but is of considerable value, can have any bearing in a situation like the present, would introduce an exceedingly dangerous element in the law upon the subject.

The provision made for the widow, in view of the fact that she had no children for whom she desired to provide, and in view of the fact that she had an estate of about Sixty Thousand Dollars (\$60,000.00) is a most reasonable provision, and one which would ordinarily, it is submitted, be assented to by the widow.

An attempt is made to fix the value of the life estate, stating on page 32 of Appellant's Brief, that Amelia E. Eberly, was before the death of her husband, sixty-nine years of age. The Record does not disclose what her age was, whether she was an old, a young, healthy or feeble woman. The only intimation given as to her possible age is the fact that Samuel G. Eberly met her in 1900.

(3) ANSWER TO APPELLANT'S PROPOSITION NO 3..

Answering Proposition No. 3, as stated in Appellant's Brief, on page 33, the Appellee contends that while Amelia E. Eberly is entitled to receive a part

of the estate of Samuel G. Eberly, that the bequest of an equitable life-estate in two-sixths of the estate of her husband adequately fulfills this. The present case is in no wise comparable to the case of *Jordan vs. American Security and Trust Company*, 38 App. D. C. 394. In that case, this Court held that the bequest to the widow was purely nominal and intended to be such and never was intended to be a substantial bequest to the wife. As the Court says on page 397:

“In the bequest under consideration the husband in effect says that, having already *satisfied* his wife’s legal claim upon his personal estate, by giving her \$6,000, he now gives her \$10,—a pure gratuity. The testator himself having declared \$6,000 as a fair equivalent for the legal claim of his wife upon his personal estate, and it developing that, if his will stands, as to her, she will have received not \$6,010 but \$10, we think the conclusion is warranted that the 10-dollar bequest is nominal in character, and that in effect nothing passed to the wife under the will. **We are not at** liberty to indulge in any presumptions as to a prior arrangement between husband and wife, because the testator has informed us why he made such a small bequest to his wife. Instead of being a gratuity or sum in addition to that already bestowed, the \$10 really constitutes the entire provision which the husband has made for his wife out of a personal estate of the value of \$20,000. As a gift, as something additional, something not necessarily measuring and satisfying a legal right, a 10-dollar bequest would be viewed in a different light. Here the disparity between the \$6,010 which the will represents as satisfying the widow’s legal right, and the amount actually passing to her, is so great as to warrant the conclusion that the testator regarded the latter sum as a nominal, and not an actual, satisfaction of the claim of the wife.

“We are not to be understood as holding that a bequest of \$10 under other and different circumstances would not put a widow to an election. What we do hold is that where it may be determined, as here, that the \$10 was intended as only a nominal satisfaction of the ‘legal right,’ to use the words of the statute, of the widow in the considerable personal estate of her husband, the widow is not called upon to renounce. By accepting such a bequest, she could not ‘be considered a purchaser with a *fair* consideration.’ ”

2.

AMELIA E. EBERLY DID NOT RENOUNCE
THE WILL AND ELECT TO TAKE HER LEGAL
SHARE OF HER HUSBAND’S ESTATE.

Section 1173 of the Code of the District of Columbia is as follows:

“Sec. 1173. Renunciation of Devises and Bequests.—A widow shall be barred of her right of dower in the land and share in the personal estate by any such devise or bequest unless within six months after administration may be granted on her husband’s estate she shall file in the Probate Court a written renunciation to the following effect: ‘I, A. B., widow of, late of, deceased, do hereby renounce and quit all claim to any devise or bequest made to me by the last will of my husband exhibited and proved according to law; and I elect to take in lieu thereof my dower and legal share of the estate of my said husband.’ If, during said period of six months, a suit should be instituted to construe the will of her husband, the period of six months for the filing of such renunciation shall commence to run from the date when such suit shall be finally determined, by appeal or otherwise.

“By renouncing all claim to any and all devises and bequests, made to her by the will of her husband, she shall be entitled, in addition to her dower, to the distributive share of his personal property, which she would have taken had he died intestate, and, except in cases of valid antenuptial or postnuptial agreements, this provision for the wife shall apply with the effect (without formal renunciation) to cases where the husband has made no devise or bequest to his wife.

“By renouncing, within the period above prescribed, all claim to any and all devises or bequests, made to him by the will of his wife, the husband shall be entitled to the distributive share in her personal property which he would have taken had she died intestate, and, except in cases of valid antenuptial or postnuptial agreements, this provision for the husband shall apply with like effect (without formal renunciation) to cases where the wife has made no devise or bequest to her husband.”

As can be seen, this section of the Code of the District of Columbia specifies in great detail the paper which shall be filed by the widow in the Probate Court to operate as a renunciation. It requires two things, one, a written renunciation renouncing all claim to any bequests made to her in the last Will and Testament of her husband, and second, that *she* shall file said renunciation in the probate court. The only verbiage of the will of Amelia E. Eberly, which concerns the estate of her deceased husband, appears in Item V, reading as follows:

“Item V. Inasmuch as I am entitled to a widow’s share in the estate of my deceased husband, Samuel G. Eberly, I give and bequeath to each of the following of my step-children (chil-

dren of my said husband), the sums specified after each of their names, as follows:

“To Raymond G. Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3,000.00).

“To William Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3,000.00).

“To Maud E. Feeley, nee Eberly, of Cleveland, Ohio, the sum of Three Thousand Dollars (\$3,000.00).

“To Ethel G. Carpenter, of Washington, D. C., the sum of One Thousand Dollars, (\$1,000.00); each, and every, of said sums so bequeathed, to be paid out of such money, securities or other property, as shall accrue to me out and in connection with the settlement of my deceased husband's estate, now in course of administration, and from no other source whatever, and in event the share thereof, allotted to me shall be insufficient to pay such sums in full, then each bequest herein made shall abate proportionately in amount.”

It will be noted that there is not one word of this section which even remotely pretends to renounce any claim which she might have to the bequest in the Will of her husband. She intended that her will be filed only in the event of her death, making it perfectly apparent that *she* never intended to file it. It was a secret document, and would have continued so had she not died. It was in her control and could have been destroyed at any time by her. Had it been to the advantage of the Appellee to have proved the election by the widow, if she lived, the Appellee would have known nothing of it.

But even granted that the paper should be held to comply with the Statute, so far as its verbiage is concerned, the renunciation is not complete until *she* files it in the probate court. The right to renounce is

purely a personal one and can be exercised only by the widow. Authority to this effect is practically universal, but the following cases are cited, in several of which the widow died within the time provided by law for the exercise of her election.

- Penhallow v. Kimball*, 61 N. H., 596, 597.
Boone v. Boone, 3 H. & McH., (Md.), 95.
Fosher v. Gulliams, 120 Ind., 172, 175.
Page v. Eldrege Public Library (Supreme Court of N. H.), 45 Atl., 411.
Church v. McLaren, 85 Wis., 122, 125.
Sherman v. Newton, 6 Gray (Mass.), 307, 308-309.
Atherton v. Corliss, 101 Mass., 40, 47.
Crozier's Appeal, 90 Pa. St., 384, 387.
Welch v. Anderson, 28 Mo., 293, 299.
Anderson's Estate, 185 Pa. St., 174, 176.
Elzroth v. Binford, 71 Ind., 455, 458.
Pinkerton v. Sargent, 102 Mass., 568, 570.

She cannot therefor execute a paper which will serve as an effective renunciation, which is intended to be filed by some one else at her death. Her personal representative, or whoever would file the paper then, would be doing that which *she* alone personally can do. In the case of *Church vs. McLaren*, 85 Wis., 122, the facts were as follows:

Robert Gunyon and his wife were both childless. He made a will on February 10, 1892, making no provision for his wife, and died four days later. His wife made a will on February 25, and after the death of her husband, she sealed and acknowledged her election to take the provision made by law instead of the provision of her husband's will, and thereafter died March 3, following, testate. On April 14, following, the husband's

will was admitted to probate and on the same day the executor of his widow filed her renunciation in Court. The executors of the husband's estate filed a petition that it be stricken from the files. The County Court held the renunciation effective and an appeal was had from this decision.

The Court, among other things, in deciding the case, said as follows:

“Without a valid election to take against the will of Robert Gunyon, deceased, or renunciation of his provisions, the personal representative of the widow, Fanny Gunyon, cannot, it is conceded, have the benefit of the provisions of Section 2172, as to the personal estate of the testator; all right which she might have had to the homestead and to dower in her husband's real estate having expired at her death. The right to make such election or renunciation is purely a personal privilege of the widow, and is terminated by her death. It is not a property right which survives to her representatives or heirs. To be operative, it must be complete within her lifetime and by the statute, it is required to be by notice filed in the Court within one year after the death of her husband; and upon filing such notice, she shall be entitled, etc., as in the statute stated. Until filed in Court, she may reconsider it, and claim under the will. It is giving of the notice *by filing it*, which is made by the statute the operative act of election or renunciation, and where a right grows out of an election, it cannot arise or come into existence until the election is complete. It is well settled that the election in such case cannot be made by any one in her name or otherwise, after her death. *Schouler Dom. Rel.* 206; *Sherman v. Newton*, 6 Gray, 307; *Atherton v. Corliss*, 101 Mass. 44, 45; *Crozier's Appeal*, 90 Pa. St. 384; *Jackson's Appeal*, 126 Pa.

St. 106, 107, 108; *Welch v. Anderson*, 28 Mo. 293. It does not appear in what way the election executed by the widow came to the hands of her executor, but presumably with her other papers. Had she, however, delivered it to him or to any other person with instructions to file it in the proper Court, this would have created a mere agency, which would have been certainly terminated by her death. For these reasons, the claims of the executor of Fanny Gunyon cannot be sustained, and the judgment of the Circuit Court in his favor is erroneous and must be reversed.”

III.

CONCLUSION.

1. It is submitted that in order for her legal representative to have a valid claim to one-third of the estate of Samuel G. Eberly, Amelia E. Eberly must have renounced the provisions of her husband's will made in her behalf.

2. That she did not renounce as provided by the Code of the District of Columbia.

This being true, it is submitted, that the ruling of the Court below approving the final report of the executor was correct and should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

IV.

ADDENDA.

ACT OF MARYLAND, 1798, CH. 101, SUB. CH. 13,
SEC. 1-5.

1. "Every devise of land, or any estate therein, or bequest of personal estate, to the wife of the testator, shall be construed to be intended in bar of her dower in lands, or share of the personal estate respectively, unless it be otherwise expressed in the will.

2. "A widow shall be barred of her right of dower in land, or share in the personal estate, by any such devise or bequest, unless within ninety days after the authentication or probate of the will, she shall deliver, or transmit to the court where such authentication of probate hath been made, a written renunciation in the following form, or to the following effect: 'I, A. B., widow of , late of , deceased, do hereby renounce and quit all claim to any bequest or devise made to me by the last will of my husband, exhibited and proved according to law; and I elect to take, in lieu thereof, my dower, or legal share of the estate of my said husband, A. B.' But by renouncing all claim to a devise or bequest, or devises or bequests of personal property, made to her by the will of her husband, she shall be entitled to one-third part of the personal estate of her husband, which shall remain after payments of his just debts, and claims against him, and no more.

3. "If the will of the husband devise a part of both real and personal estate, she shall renounce the whole, or be otherwise barred of her right to both real and personal estate.

4. "If the will devise only a part of the real estate, or only a part of the personal estate, the

devise shall bar her of only the real, or personal estate, as the case may require: *Provided nevertheless*, That if the devise of either real or personal estate, or of both, shall be expressly in lieu of her legal share of one or both, she shall accordingly be barred unless she renounce as aforesaid.

5. "But if in effect, nothing shall pass by such devise she shall not be thereby barred, whether she shall or shall not renounce as aforesaid, it being the intent of this act, and consonant to justice, that a widow accepting, or abiding by a devise, in lieu of her legal right, shall be considered as a purchaser with a fair consideration.

2 Kilty Laws Md. 1798 Ch. 101 Subch. 13.

Abert's Comp. Stat. D. C. p. 35, sec. 157-161."

